138-271

138-271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 148.

J. M. NORTH, APPELLANT,

vs.

ANDREW PETERS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 6, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 148.

J. M. NORTH, APPELLANT,

vs.

ANDREW PETERS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Summons	1	1
Complaint	2	1
Affidavit of Andrew Peters	4	3
Deed—P. M. Lund to Andrew Peters, November 12, 1883	7	6
Temporary injunction	7	7
Injunction bond	8	8
Amended complaint	8	9
Motion to fix bond at $10,000	11	12
Order to show cause	11	12
Notice of motion to modify injunction	11	12
Order fixing amount of bond	12	13
Answer	12	13
Affidavit of J. M. North	17	18
Order fixing amount of bond	17	19
Motion to fix bond at $10,000	18	19
Order to show cause	18	19
Affidavit of J. M. North	18	20
Notice of motion to modify injunction	19	20
Restraining order	19	21
Motion to instruct the jury	20	22
Verdict	21	23
Motion to dismiss and also for re-submission	21	23
Affidavit of L. B. Odean	23	25
J. S. Aandahl	25	28
C. B. Kennedy	26	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 29, 1890.

	Original.	Print.
Notice of motion to dismiss, &c.	27	31
Motion for new trial	28	31
Affidavit of Orlando Alexander	29	33
F. P. Smith	30	34
Order denying motion for new trial, &c.	30	35
Finding of facts	31	35
Conclusions of law	32	36
Decree	32	37
Exceptions to findings	33	38
Order granting time to prepare bill of exceptions, &c.	33	39
Notice of motion for new trial	34	39
Motion for new trial	35	39
Additional findings	35	40
Conclusions of law	36	41
Order denying motion for new trial	36	43
Orders extending time to settle bill of exceptions	37	44
Order continuing motion to settle bill of exceptions	38	45
Notice of settling bill of exceptions	38	45
Proposed bill of exceptions	39	46
Motion for verdict	39	47
Charge to jury	40	48
Findings of fact	44	52
Conclusions of law	44	53
Additional findings and conclusions	45	54
Order settling bill of exceptions	47	56
Judge's certificate	47	57
Notice of appeal	48	58
Clerk's certificate	49	59
Assignment of errors	49	60
Decree	52	63
Request to withhold remittitur	53	64
Affidavit of disbursements, &c.	53	64
Request for rehearing	54	65
Petition for rehearing	54	66
Notice of motion for rehearing	55	66
Order allowing appeal	55	67
Bond	56	68
Journal entries	57	69
Clerk's certificate	58	70
Certificate of clerk as to remittitur	59	70
Stipulation as to filing certificate	60	70
Affidavit of value	62	71
Assignment of errors	63	71
Certified copy of appeal bond	69	74
Citation	74	76
Proof of service of citation	75	76

1 TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Lincoln County.

ANDREW PETERS, Pl't'f, }
vs.
J. M. NORTH, Def't. }

The Territory of Dakota sends greeting to J. M. North, defendant:

You are hereby summoned and required to answer the complaint in this action, a copy of which will be served upon you herewith, and to serve a copy of your answer on the subscriber, at his office on Fifth street, in the city of Canton, Dakota Territory, within thirty days after the service of this summons, exclusive of the day of service. If you fail to answer the complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Canton, D. T., this 16th day of November, A. D. 1883.

K. C. STABACK,
Plaintiff's Attorney.

Filed Dec. 6th, 1883.

WM. M. CUPPETT, *Clerk.*

2 TERRITORY OF DAKOTA, } ss:
Lincoln County, }

Fourth Judicial District, District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

The complaint of the plaintiff shows to this court and alleges:

I. That at Canton, D. T., ever since the 12th day of November, 1883, the plaintiff was and is now the sole, absolute, and unqualified owner of all that certain property, goods, wares, and merchandise contained in the rented store building of the late P. M. Lund & Co., on Main street, in Canton, D. T.

II. That on the 15th day of November, 1883, Wm. M. Cuppett, clerk of the court in and for said county, issued pretended, informal, and unauthorized writs of attachment against the property of P. M. Lund & Co., and, as plaintiff is informed and believes, threatens and is about to issue a large number of such writs for the purpose of vexing and annoying plaintiff.

III. That on the same date J. M. North, sheriff in and for said county, excessively levied and pretended to serve the said pretended writs, directed to him to be served upon and against the property of said P. M. Lund & Co., upon and against the plaintiff's said property without authority of law, done with the intent to vex and annoy the plaintiff and oppress him.

That the said North well knew and was duly notified that said property belonged to plaintiff and was duly notified and forbidden

to in any manner interfere therewith; but said North, in disregard of his duty and in violation of law, maliciously entered the store premises of the plaintiff and *under* a pretended excessive levy upon all the plaintiff's property therein of the value of over ten thousand dollars, upon said pretended writ, of about $300, and unlawfully made an assault upon and forcibly ejected the plaintiff from said store at about ten o'clock in the night.

And the said North threatens and is about to serve a large number of said pretended writs issued against said P. M. Lund & Co. upon the property of plaintiff, and that said North has fallen into a conspiracy with divers persons and is allowing himself to be used as an instrument to oppress and damage the plaintiff.

IV. That the said P. M. Lund & Co. have no lien, claim, title, or interest in and to said property *was* any part thereof, and that no other persons, firms, or corporations have any title or ownership therein, plaintiff being sole owner thereof.

V. That the said property consists chiefly of what is known as fall and winter stock of general merchandise and contains much property of a perishable nature, and that the defendant wrongfully and unlawfully retains the possession thereof and *are* exercising rights of property and ownership therein wrongfully, and much of said property is broken in bulk and open, and the plaintiff cannot tell how much, if any, thereof be taken away or stolen, being
3 excluded from exercising his lawful rights to care for and protect the same; that the plaintiff verily believes that he has no plain, speedy, and adequate remedy at law in the premises, and that unless the defendant and all others be restrained from doing said act irreparable injury and damage will result — the plaintiff by reason thereof; that the plaintiff is not protected by any bond or undertaking in the premises, and no papers of any kind have been served upon plaintiff, and that the said North or any other person has no writ or papers to serve upon plaintiff against his property in the premises, but the defendant pretends to take the property of plaintiff upon a claim and writ against the said P. M. Lund & Co.; that the said property at the time of its purchase and delivery to plaintiff had no lien or incumbrance of any kind, name, sort, or description against it or any part thereof; that plaintiff owned the good will and trade of said Lund & Co., and *now* at the time of the acts herein complained of in personal possession and ownership of said property and enjoying a good trade and business, and the acts of defendant are intended to and will maliciously destroy the same and ruin this plaintiff, and that plaintiff has no other available property, and that he has ever enjoyed a good name and credit, and said defendant is about to destroy the same, and that if said acts are allowed and permitted irreparable mischief and damage will result to plaintiff, to his utter ruin.

VI. That defendant has been fully and duly notified that said property belongs to plaintiff.

VII. The plaintiff is unable to procure all the bonds that will be required, as he verily believes, to pursue said property and retake the same, as the defendant therein *and* is about to bring a multi-

plicity of suits against said Lund & Co. and serve them against plaintiff's property for the purpose of maliciously ruining him and causing him great annoyances, expenses, and damage; and the plaintiff alleges that the said defendant North's official bond is grossly inadequate for and insufficient to afford the plaintiff proper protection in the premises; that the said defendant *are* asserting an unfounded and illegal claim as against *their* plaintiff; that if plaintiff be not allowed to pursue his said business properly the injury cannot be amply compensated by damages, and that if said goods be not sold at this time the damage will be nearly total and there can be no *recovery*, under the peculiar circumstances of the case, of accurately ascertaining the same, and irreparable mischief will result.

VIII. That said goods are situated in a wooden building among a row of similar buildings in close proximity, and the fire risk is quite large, and the plaintiff has $8,000 insurance now upon said property, and that by reason of the premises the various insurance companies therein *and* are about to cancel said insurance, and other companies, as plaintiff is informed and believes, will refuse to convey the risk by reason of the said litigation, and that if said property should be destroyed by fire a great and irreparable damage would result to plaintiff; that generally as to said property by reason of the premises aforesaid the plaintiff can have no means of forming any real or actual estimate of the irreparable damage that may result; that the various steps taken by defendant are clearly against the law and the facts, which are specially injurious; that the plaintiff was worth in money and property about $8,000 immediately prior to the purchase of said property of said Lund & Co. and used the same for its purchase.

4 Wherefore the plaintiff prays that the defendant, his attorney, agents, deputies, servants, and all other persons, firms, and corporations be restrained from the commission of said acts by an order of the hon. chief justice, acting at chambers as judge for said court, and for such other and further relief in the premises as may be just and equitable, with costs and disbursements.

Dated Canton, D. T., Nov. 16, 1883.

K. C. STABECK,
Pl'ff's Att'y.

TERRITORY OF DAKOTA, } ss:
Lincoln County, }

Andrew Peters, being first duly sworn, says he is the plaintiff in the foregoing-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true except as to matters therein stated on his information and belief, and as to those that he believes it to be true.

ANDREW PETERS.

Subscribed and sworn before me this 16th day of November, 1883.

[SEAL.]

CHAS. E. JUDD,
Notary Public.

(Endorsed :) Filed Dec. 6th, 1883. Wm. M. Cuppett, clerk.

TERRITORY OF DAKOTA, } ss :
County of Lincoln, }

Fourth Judicial District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

LINCOLN COUNTY, *ss :*

ANDREW PETERS, being first duly sworn, says that he is the plaintiff in the above-entitled action ; that he is a resident of and doing business in Canton, in said county.

That on the 12th day of November, A. D. 1883, he purchased and paid in full for a certain stock — property, goods, wares, and merchandise of P. M. Lund & Co., as per copy of bill of sale therefor hereto attached and made a part hereof.

That immediately thereafter deponent went into the actual possession of said property and commenced the sale of goods at retail to customers in the usual course of trade.

That deponent continued in the business peaceably and uninterruptedly until the fifteenth day of November, 1883, at ten o'clock p. m.

That deponent purchased said property in good faith, and the same were delivered to him by said P. M. Lund & Co. for value first fully paid ; that deponent searched and caused the records of said county to be searched for any liens or incumbrances against said property, and that there were none and the same were free and clear ; that deponent required of said P. M. Lund & Co. if there were any claims, demands, liens, or incumbrances of any nature or description against said property, and was informed by said Lund and Co. that there were none and that the said property was free and clear in all respects ; that the stock in said store, to the
5 best of deponent's knowledge, information, and belief, amounts to more than ten thousand dollars ; that the goods principally consist of so-called fall and winter stock ; that deponent further procured the good will and trade of said P. M. Lund & Co. for value ; that deponent has a good and valuable stand in a retail store building on a principal street in Canton, said county, and that the said P. M. Lund & Co. and deponent have ever enjoyed a good and large trade and credit ; that deponent is the sole, absolute, and unqualified owner of said property, and had no knowledge of the said P. M. Lund and Co. having any creditors or that they were indebted to any one at the time of the delivery of the said property by said Lund and Co. to plaintiff ; that deponent has several thousand dollars due him ; that — is the most important time and season for the sale of said property and to make collections, and that if deponent is prevented from selling said goods and making said collections immeasurable and irreparable injury and damage will result to him ; that deponent is under obligation and great expenses in the matter

of said business; that deponent is under contract and bound to the payment of large sums of money at this time, and that he has no other available means to meet the same, and that if the acts herein stated be not enjoined he will be financially ruined; that the deponent is an old man, over fifty years of age, and unable to do or perform manual labor, and that he has a family dependent upon him in part for their support; that the defendant has threatened to bring or serve a multiplicity or large number of suits and attachments thereon against said Lund and Co. and serve them upon the deponent to hamper, annoy, and ruin the plaintiff; that one Wm. M. Cuppett, pretending to act by virtue of his office as clerk of said court, has, as deponent is informed and believes, issued or threatened to issue a large number of writs of attachment against the said P. M. Lund and Co. without authority of law and without authority using the name of Hon. A. J. Edgerton, chief justice of said Territory, therein, he, the said Edgerton, nor no other judge having ever presided as judge of said court in said county since said office became vacant by the death of the late Hon. J. P. Kidder, and the deponent —, by virtue of his office as sheriff in and for said county, proposes and threatens to serve such writs of attachment against the property of plaintiff, although not directed in said writs so to do; that said defendant *have* been notified and informed that plaintiff is the absolute owner of said property, and that he proposes to do and perform said acts for the purpose of vexing, annoying, and, if possible, wasting the property of deponent and ruining him in his trade, credit, and business; that said defendant entered the store of plaintiff and forcibly ejected him and his customers and employees therefrom on the night of November 15th, 1883, as deponent is informed and believes, without authority of law; that said North admitted to deponent that he had no writ of any kind against the deponent nor against any of his property at that time, but proposed to do so at the acting illegally as against deponent, but that he was indemnified, and for the further reason that he was instructed so to do by divers persons; that said acts are specially injurious to plaintiff and, if continued or permitted, will result in a violation of plaintiff's rights and endanger the rights — property and business interest of the plaintiff and others of the county; that the said sheriff's bond *are* inadequate — insufficient to cover the amount of property, and, as deponent is informed and believes, his
6 bondsmen are in some instances *are* insolvent or nearly so and have no property over and above their debts and liabilities and exclusive of property exempt; that the goods in said store are open and in such condition that the deponent can have no means of telling the amount how much, if any, be taken or stolen; that deponent greatly fears that said North has or will permit dishonest and irresponsible persons in or about said store, and that deponent will *have* much of his property in consequence thereof unless deponent be allowed to exercise his rights of property and look after the same; that said deponent is demanding and claiming an entirely illegal and unfounded claim against deponent's property; that deponent verily believes it will be impossible to obtain bondsmen

in any proceeding at law, the plaintiff believing that he has no plain, speedy, adequate remedy at law in the premises, and that the injury in the premises cannot be amply compensated by damages; that if said goods be not sold at this time they will depreciate to such an extent that the damage will be nearly total, and there can be no means of accurately ascertaining the same; that deponent is informed and verily believes that the said defendant's various attorneys, agents, and others threaten and are about to participate in said acts and bring a multiplicity of suits, and thereby cause deponent a great unnecessary annoyance, damage, and expense, which he fears can never be recovered by reason of the non-residence and irresponsibility of many of the parties concerned, and irreparable mischief will result; that goods to a large quality in value in said store are of a perishable nature and need constant care and attention, and deponent has no means of arriving at the amount of damage that will inevitably result unless defendant be restrained as provided by law; that deponent has not slept upon his rights nor been guilty of any fraud, deceit, or evil practice in said matter, but that he is the *bona fide* owner of said property for value without notice of any claim against the same; that the defendant *have* taken aggressive steps clearly against the law and the facts, which are especially injurious to plaintiff, and the plaintiff prays that he and all others be required to restrain*ed* their steps, and that a continuance of their acts be further enjoined; that plaintiff prays that said defendant be required to surrender and vacate the said store and abstain from doing the acts threatened, and the plaintiff prays that the defendant be enjoined from serving writs, directed against third parties, upon plaintiff, and from in any manner interfering with said property; that the said P. M. Lund & Co. are to deponent's certain knowledge solvent, and that he is a resident of said county, where his homestead and family now are, and deponent is informed and verily believes that he is merely temporarily absent on business; herefore deponent prays that an order may issue restraining the defendant, his agents, attorneys, servants, deputies, and all other persons from doing any of the acts therein complained of; and further deponent sayeth not.

ANDREW PETERS.

Subscribed and sworn to before me this 16th day of November, 1883.

[NOTARIAL SEAL.] CHARLES E. JUDD,
Notary Public.

Filed December 6th, 1883.

WM. M. CUPPETT, *Clerk.*

7 Know all men by these presents that P. M. Lund and Company, of the city of Canton and Lincoln county and Territory of Dakota, as party of the first part, for and in consideration of the sum of ten thousand three hundred and eighty dollars in hand paid at or before the delivery of these presents by Andrew Peters, of the same place of residence, as party of the second part, the receipt

whereof is hereby acknowledged, have bargained, sold, granted, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said Andrew Peters, the party of the second part, his executors, administrators, and assigns, all the goods, wares, and property and merchandise contained in the rented store building of P. M. Lund and Company, situated on Main street, in the city of Canton, Lincoln county, D. T., consisting chiefly of dry goods and notions, boots and shoes, hats and caps, glassware and crockery, clothing, jewelry, groceries, provisions, gloves and mittens, oil, and all other goods, property, and things of every nature and description; also all fixtures, tools, and machinery, and stoves and piping, safes, desks, tables, sewing-machines, and all other articles in use in said store; to have and to hold the same unto the said party of the second part, his heirs, executors, administrators, and assigns forever; and the said party of the first part covenant and agree to and with the second party to warrant and defend the said property, sold as aforesaid to said second party, his heirs and assigns, against all and every person and persons whomsoever.

In witness whereof we have hereunto set our hand and seal this 12th day of November, 1883.

P. M. LUND AND CO.

Signed and sealed in presence of—

J. W. TAYLOR.

Filed Dec. 6th, 1883.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA:

District Court, County of Lincoln, 4th Judicial District.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Def't. } Temporary Injunction.

On reading the complaint in this action, duly verified, also the affidavit of Andrew Peters — J. W. Taylor, hereto annexed, I hereby order and enjoin the defendant and all other persons, firms, corporations, officers, deputies, and attorneys and counsellors, agents and assistants, and each and every of them, under the penalties by law prescribed, that he, they, and each and every of them do absolutely desist and refrain from in any manner interfering with that certain stock of general merchandise claimed and owned by said plaintiff, Andrew Peters, at Canton, Dakota, and that you retrace the steps and proceedings already taken in the premises and restore the plaintiff to his property and the condition in which you found them: Provided, that this order shall not be enforced until Nov. 20, 1883, and that the said defendant shall come before me at the court-house in Yankton, Dak., on Nov. 20, 1883, at eight o'clock a. m., — why the above injunction shall not then issue until this court shall make

further order in the premises. Let this order and the other papers therein referred to be served on the defendant Nove. 17th, 1883.

Dated the 16th day of Nov., A. D. 1883.

A. J. EDGERTON, *Judge.*

Filed Dec. 6th, 1883.

WM. M. CUPPETT, *Clerk.*

8 TERRITORY OF DAKOTA:

Fourth Judicial District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH.

Whereas the above-named plaintiff has commenced an action in the district court of the fourth judicial district of the Territory of Dakota in and for Lincoln county against the above-named defendant, and is about to apply for an injunction in said action against the said defendant enjoining and restraining them and each of them from the commission of certain acts, as in the affidavit in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of Lincoln, in consideration of the premises and of the issuing of the said injunction, do, jointly and severally, undertake, in the sum of two thousand dollars, and to promise to the effect that the plaintiff will pay party enjoined damages, not exceeding two thousand dollars, as may be sustained by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto.

ANDREW PETERS. [SEAL.]
J. W. TAYLOR. [SEAL.]

TERRITORY OF DAKOTA, } ss:
Lincoln County,

J. W. Taylor, being duly sworn, says that he is a surety in the above bond; that he is a resident and freeholder in said county; that he is worth the sum in said undertaking specified as penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. W. TAYLOR.

Subscribed and sworn to before me this 16th day of November, A. D. 1883.

[NOTARIAL SEAL.] CHAS. E. JUDD,
Notary Public.

Filed Dec. 6th, 1883.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs. } Amended Complaint within 20 Days.
J. M. NORTH, Defendant. }

The complaint of this plaintiff shows to this court and alleges:

1. That at Canton, D. T., ever since the 12th day of November, 1883, the plaintiff was and is now the sole, absolute, and unqualified owner of all that certain property, goods, wares, and merchandise contained in the rented store building of the late P. M. Lund & Co., on Main street, of the value of over ten thousand dollars.

2. That on the 15th day of November, 1883, Wm. M. Cuppett, clerk of the said court, issued pretended, informal, and unauthorized writs of attachment against the property of P. M. Lund & Co., and, as plaintiff was informed and believed, threatened and is about to issue a large number of such writs for the purpose of vexing and annoying the plaintiff.

3. That on said date J. M. North, the sheriff in and for
9 said county, excessively levied and pretended to serve said pretended writs, directed to him to be served upon and against the property of said P. M. Lund & Co., upon and against the plaintiff's said property without authority of law, done with the intent to vex, annoy, and oppress the plaintiff; that the said North well knew and was duly notified that said property belonged to plaintiff, and was forbidden to in any manner interfere therewith, but said North, in disregard of his duty and in violation of law, maliciously entered the store premises of the plaintiff and made a pretended and excessive levy upon all of the plaintiff's said property therein, which said property was of the value of and worth over ten thousand dollars, upon said pretended writs of about $700, and unlawfully made an assault upon and forcibly ejected the plaintiff from said store at about ten o'clock in the night; that said North threatened and is about to serve a large number of said pretended writs issued against said P. M. Lund & Co. upon the said property of plaintiff, and the said North has fallen into a conspiracy with divers persons, and is allowing himself to be used in his office to oppress and damage the plaintiff.

4. That the said P. M. Lund & Co. have no lien, claim, title, or interest in and to said property nor any part thereof, and that no other persons, firms, or corporations have any title or ownership therein, the plaintiff being the sole owner of said property.

5. That the said property consists chiefly of what is known as fall and winter stock of general merchandise, and contains much property of a perishable nature, and that the defendant unjustly and unlawfully retains the possession thereof, and is exercising rights of property and ownership thereof wrongfully, and much of said property is broken, in bulk, and open, and the plaintiff cannot tell how much, if any, thereof be taken away or stolen, being excluded from

exercising his lawful rights to care for and protect the same; that the plaintiff verily believes that he has no plain, speedy, and adequate remedy at law in the premises, and that unless the defendant and all others be restrained from doing said acts or from in any manner interfering with the plaintiff's said property irreparable injury and damage will result to plaintiff by reason thereof; that the plaintiff is not protected by any indemnity bond or undertaking in the premises, and no papers of any kind have been served upon plaintiff, and that the said defendant or any other person has no writ or papers to serve upon plaintiff or against his property in the premises, but the defendant pretended to take the property of plaintiff upon a claim and writ against the said P. M. Lund & Co.; that the said property at the time of its purchase and delivery to plaintiff had no lien or incumbrance of any kind against it or any part thereof; that the plaintiff for value purchased the good will and trade of said P. M. Lund & Co., and was at the time of the acts herein complained of in the peaceable *permission* and ownership of said property and enjoying a good large trade and profitable business at a good stand, having a large number of customers, and the acts of the defendant are intended to and will maliciously destroy the same and ruin this plaintiff; that plaintiff is an old man over 53 years of age; that he embarked in said business in good faith; that the plaintiff has no other available property, and that he has ever enjoyed a good name and credit, and said defendant is about to destroy the same; that at the time of entering into said
10 business the plaintiff was worth in money and property about $8,000, and that to enable and assist him in procuring the said property and business the plaintiff executed and delivered a mortgage upon all of his property, and depended wholly upon said business to pay the same, and that he has no other means or way to pay the same; that plaintiff also has a family dependent upon him in part for their support, and that if the said acts are allowed and permitted irreparable mischief and damage will result to plaintiff, his hopes and prospects in life blasted, and he will be a ruined man.

6. That plaintiff verily believes that he would be unable to procure all the bonds that will be required to pursue and retake said property, and that the defendant or others threatened and is about to bring a multiplicity of suits against said Lund & Co. and serve them against the plaintiff's said property for the purpose of maliciously ruining him and causing him great annoyance, damage, and expense; any one of which said suits would determine the whole matter claimed or at issue.

7. That the plaintiff, on information and belief, alleges that the said North's official bond as sheriff is grossly inadequate, poor, and insufficient to afford the plaintiff proper protection in the premises.

8. That the defendant is asserting an unfounded and illegal claim as against this plaintiff, and that if plaintiff be not allowed to pursue his said business peaceably the injury cannot be amply compensated in damages, and that if said goods be not sold at this time the damage will be nearly total, and there can be no means, by reason

of the circumstances of the case, of accurately ascertaining the same, and irreparable mischief will result.

9. That said goods are situated in a wooden building amongst a row of similar buildings, and the fire risk is large; that plaintiff has $8,000 of insurance now upon said property, and that by reason of the premises the various insurance companies threaten and are about to cancel said insurance, and other companies, as plaintiff is informed and believe, will refuse to carry the risk by reason of said litigation, and that if said property should be destroyed by fire great and irreparable damage would result to plaintiff; that generally as to said property and good will, by reason of the premises aforesaid, the plaintiff can have no means of forming any real or actual estimate of the irreparable damage that may result, and that the various steps taken by defendant are clearly against the law and the facts, which are especially injurious; that the plaintiff is the *bona fide* owner of said stock, which is valuable, and purchased for the business of the season of 1883, and not all paid for by plaintiff; that his only means of paying therefor is through his sales; that he purchased said property and the same was delivered to him by said P. M. Lund & Co. on the 13th day of November, 1883, at which time, 6 p. m., he went into the possession thereof and engaged in said business on his own account; that he purchased a valuable trade established by said Lund & Co., and had and was still further better securing and establishing the same, and if his store is closed or the goods taken from him or the sale even delayed long he will not only be rendered insolvent, but his credit destroyed, his customers lost and gone elsewhere, his business wholly broken up, and his prospects of life blasted; that said business was of a retail character, and the plaintiff alleges that he searched and caused the records of said county to be searched, and there were no claims, liens, or
11 incumbrances against said property, and the plaintiff was informed by said P. M. Lund & Co. that there was nothing due for said property, and the same was free and clear.

Wherefore the plaintiff prays that the defendant, J. M. North, his attorneys, agents, deputies, servants, and all other persons, firms, and corporations be restrained and perpetually enjoined from in any manner interfering with the plaintiff's said property, and that he and they be restrained and perpetually enjoined from doing any of the acts herein complained of, and that he and they be required to retrace their steps and surrender said property and replace the same in the position and condition he found it by an order of this court or judge, as provided by law, and for such other and further relief in the premises as may be meet and equitable, with costs and disbursements.

Dated Canton, D. T., Dec. 5, 1883.

K. C. STABECK,
Plaintiff's Attorney.

TERRITORY OF DAKOTA, }
Lincoln County. }

Andrew Peters, being duly sworn, says that he is the plaintiff

above named, that he has heard read the foregoing complaint, and that the same is true except as — the matters therein stated on information and belief, and as to those matters he believes it to be true.

ANDREW PETERS.

Subscribed and sworn to before me this 5th day of Dec., 1883.

CHAS. E. JUDD,
Notary Public.

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

Now comes the above-named defendant, by O. S. Gifford, his att'y, and moves, upon the annexed affidavits and all the papers in the case, that the undertaking required to be given by the plaintiff be fixed at the sum of ten thousand dollars.

Dated Dec. 5th, 1883.

O. S. GIFFORD,
Att'y for the Def't.

Upon the annexed affidavit and all the papers in the within-entitled cause let the plaintiff show cause before me, at the court-house, in Yankton, D. T., on the 6th day of December, 1883, at two o'clock in the afternoon, why the within motion should not be granted.

Dated Dec. 6th, 1883.

A. J. EDGERTON, *Judge.*

Filed Dec. 8th, 1883.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, }
Fourth Judicial District, } *ss:*

In the District Court within and for the County of Lincoln.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

SIR: Please to take notice that upon the annexed answer, affidavit, and upon all the papers in the above-entitled cause, with a copy whereof you are hereby served, a motion will be made before the Hon. A. J. Edgerton, presiding judge of second judicial district, at the court-house, in the city of Yankton, in the county of Yankton, D. T., on the 21st day of December, A. D. 1883, at five o'clock
12 p. m. of that day, or as soon thereafter as counsel can be heard, for an order so far modifying the restraining order granted herein against the defendant so that said order will designate definitely as to what attachment or other writs said order refers to and against which it operates, and as to what writs and acts of defendants

said order refers in forbidding to interfere with the property described in the complaint of plaintiff, or for such other and further relief in the premises as shall be just.

Dated the 18th day of December, 1883.

Yours, &c.,

KENNEDY BROTHERS.
F. R. AIKENS AND
O. S. GIFFORD,
Attorneys for the Defendant.

To K. C. Stabeck, Esq., att'y for plaintiff.

Filed January 12, 1884.

WM. M. CUPPETT,
Clerk District Court.

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

The above-entitled cause coming before the Hon. A. J. Edgerton, presiding judge of 2nd judicial district, at chambers, at Yankton, D. T., on the 6th day of December, 1883, to be heard, upon motion of the defendant above named, that the undertaking required to be given by plaintiff be fixed at the sum of ten thousand dollars, O. S. Gifford appearing for the defendant and Bartlett Tripp for the plaintiff—

It is ordered and adjudged that the undertaking required to be given by plaintiff herein be increased and fixed at the sum of seven thousand five hundred dollars, and the order heretofore made herein is hereby amended to conform to the said amendment.

Done at Yankton, D. T., this 6th day of December, 1883.

A. J. EDGERTON, *Judge.*

To which ruling and order the plaintiff excepted, which exception was allowed.

A. J. EDGERTON, *Judge.*

Filed December 8th, 1882.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court within and for Lincoln County.

ANDREW PETERS, Plaintiff, }
against
J. M. NORTH, Defendant. }

The defendant, for answer to the complaint of the plaintiff, alleges—

1st. The said defendant denies that he has any knowledge or in-

formation sufficient to form a belief that at the time alleged in said complaint or at any other time the plaintiff owned or possessed the goods or chattels, wares, merchandise, or property described in the said complaint, or any part thereof, in any manner whatever, or that the same were or are of the value of ten thousand dollars, or any other value.

2nd. That said defendant further denies that at the time alleged in the said complaint or at any other time or place the defendant wrongfully or maliciously took, levied upon, or disturbed the
13 said goods, wares, and merchandise described in said complaint, or that he unjustly or excessively levied upon the same in violation of law; and the said defendant further denies that he has fallen into any conspiracy whatsoever with any persons, and he denies that he is allowing himself to be used in his office to oppress or damage the plaintiff or any other person whomsoever in any manner or to any extent.

3d. The said defendant further denies that he has excessively or otherwise levied or served any pretended or other spurious or invalid writs of attachment upon plaintiff or any other person's property, but defendant avers that he has received, as sheriff of Lincoln county, D. T., several valid writs of attachment, a more particular description of which is elsewhere given herein, which were sued out of this court, which writs were directed to the sheriff of Lincoln county, Dakota Territory, and commanded him to levy upon and seize the goods, wares, and chattels, lands and tenements, of P. M. Lund & Co., and that by virtue of said writs this defendant did levy upon and seize the stock of dry-goods, groceries, boots, shoes, clothing, and other goods, wares, and merchandise belonging to and owned by said P. M. Lund & Co., in Canton, D. T.; and the defendant further avers that the plaintiff herein thereupon at once set up a false, fraudulent, and spurious claim of ownership to said property levied upon, and the said plaintiff, at the time of said levy, wrongfully, unlawfully, and maliciously interfered with this defendant in the performance of his said official duties and attempted to prevent the lawful execution of said writs; and the defendant further avers that the said property so taken by virtue of said writs as aforesaid and the said acts of defendant is supposed to be the stock of goods, writs, acts referred to in plaintiff's complaint.

4th. And for a further defense to the allegations in said complaint contained defendant avers at the time therein alleged and in the answer referred to he was and still is the sheriff of Lincoln county, Dakota Territory, duly qualified and serving as such; that before the commencement of this action in several certain actions commenced in this court the plaintiff in each cause sued out and caused to be issued from said court writs of attachment in their behalf, which were authorized and issued in due form of law, first filing with the clerk thereof in each cause due and sufficient affidavits and undertakings required by law to authorize the issuing of said writs; that said writs were directed to the sheriff of said county, and, after containing the statements and recitals of the matter by law required to be stated and set forth, directed and ordered the said sheriff to

attach and safely keep all the property of said P. M. Lund & Co. within the said county not exempt from execution, or so much thereof as may be sufficient to satisfy the demands or amounts stated in said several writs, which said several amounts were stated to be actually due said several parties over and above all legal set-offs.

That said writs were issued and delivered to defendant at the dates, in amounts in favor of, and at the suits of parties as follows, to wit:

14 Names of attaching creditors.	Amounts.	When attachment rec'd.
Van Keuren & Floid	$303 12	November 15, 1883
A. G. Leonard & Co.	441 06	" 15, 1883
E. C. Palmer & Co.	338 00	" 16, 1883
Wymon, Mullen & Van Dyke	2,831 56	" 16, 1883
Van Keuren & Floid	277 00	" 16, 1883
Forepough & Tarbox	339 00	" 17, 1883
Bentley, Jaquith & Co.	657 20	" 17, 1883
J. V. Farwell & Co.	622 00	" 17, 1883
J. H. Price & Freedman	355 30	" 19, 1883

That under and by virtue of said writs of attachment this defendant, as sheriff of the county of Lincoln aforesaid and not otherwise, levied upon certain goods, wares, and merchandise of the character and description of these mentioned and described in the complaint, took the same into his custody on the 15, 16, 17, and 19 days of November, 1883, and said writs were respectively received, and was making an inventory thereof, as required by law, when this defendant was forbidden to do any act concerning said property by an order of this court made herein, and which goods, wares, and merchandise defendant believes to be those referred to in the complaint, and that said levy and taking and detention as aforesaid constitute the supposed wrongful taking in said complaint alleged; that said levies were fairly and lawfully made by defendant, as said sheriff, and were made in honest belief that the said property then did and now does belong to P. M. Lund & Co.

6th. That this defendant further alleges, upon his information and belief that the goods, wares, and merchandise levied on as aforesaid were at the time of said levy the property of the said P. M. Lund & Co. and were subject to levy at the suit of said parties.

7th. The defendant, further answering, avers upon information and belief that the plaintiff's claim to the said goods, wares, and merchandise described in his complaint and herein referred to is founded upon, under, through, and by virtue of a pretended sale or transfer thereof by said P. M. Lund & Co. to him through some pretended bill of sale dated November 12th, 1883; and defendant further avers, upon information and belief, that the same was executed by said P. M. Lund & Co. and said pretended sale or transfer took place without consideration and was conducted in a secret and deceitful manner and with intent to defraud his creditors, and that this plaintiff had full knowledge of such intention and accepted said pretended transfer and sale for the purpose of assisting, abetting,

and conniving with said P. M. Lund & Co. to defraud his said creditors, and that said pretended sale or transfer on account of such fraud was null and void as against said creditors and as against said writs of attachment and as against other creditors of the said P. M. Lund & Co.

8th. The said defendant, further answering, upon his information and belief avers that previous to and at the time of the levy of the said writs of attachment as aforesaid the said P. M. Lund & Co. was insolvent and absolutely unable to pay his debts; that he was indebted to a large number of persons in large sums, to wit, the sum of about eight thousand dollars; that nearly the whole thereof was due and all would be due in a very short time; that he had no real estate in the Territory or elsewhere and no other property visible within the reach of process, excepting the property herein referred to as having been levied upon.

9th. That since and subsequent to issuing of said warrants
15 of attachment heretofore referred to other suits have been commenced in this court by different and other creditors of said P. M. Lund & Co. against said firm, and said creditors have in like manner sued out writs of attachment in their behalf, which writs are of like import and effect as those heretofore referred to, directed to the sheriff of Lincoln county, a more particular description of which actions, time when said writs were received by defendant, and amounts claimed to be due thereon, together with the names of the plaintiffs or attaching creditors are as follows, to wit:

Names of attaching creditors.	Amount.	When received.
James Beach	$21 50	December 10, 1883
Geo. B. Rowell	35 00	" 10, 1883
Sweet, Dempter & Co.	37 62	" 10, 1883

10th. That since and subsequent to the issuing of said warrants of attachment heretofore referred to other suits have been commenced in the district court in and for Davison county, D. T., against said firm, and said creditors have in like manner sued out writs of attachment in their behalf, which writs are of like import and effect to those hereinbefore referred to, directed to the sheriff of said Lincoln county, a more particular description of which action, time when said writs were received by defendant, and amount claimed to be due thereon, together with the names of the plaintiffs or attaching creditors are as follows, to wit:

Name of attaching creditor.	Amount claimed to be due in writs of attachment.	When rec'd.
Myers, Tyll & Co.	$191 30	December 12, 1883
Henzenyer, Taber & Co.	47 70	" 12, 1883
J. Oderfelder	69 00	" 12, 1883
Emmerson, Shermen & Co.	235 25	" 12, 1883
Jacod, Frenches & Bro.	50 73	
Preston & Mott	36 85	

11th. The said defendant avers that the aggregate amount — indebtedness set forth in the several writs of attachment herein re-

ferred to and now in his hands for levy is $6,889.19; that he has made diligent search and inquiry throughout his county for property belonging to the said P. M. Lund & Co. and cannot find any property whatever belonging to him upon which to levy the same, excepting the stock of goods, wares, and merchandise herein referred to; and this defendant verily believes that no part of the indebtedness of said P. M. Lund & Co. herein referred to will be secured or paid excepting by or through the said several levies upon said stock of goods.

That the said P. M. Lund & Co., through the aid and assistance of this plaintiff and other parties, has effectually secreted, disposed of, and placed all of his property, excepting said stock of goods, out of reach of his said creditors and all kinds of process.

12th. That said P. M. Lund & Co. has for about three years last past been doing business as a retail dealer in general merchandise at Canton, Dakota; that he has incurred large indebtedness, to wit, about eight thousand dollars; that said indebtedness has been incurred in buying and keeping up the stock of goods herein referred to, and a large amount of said indebtedness is now due and owing for the identical goods, wares, and merchandise included in those levied upon as herein set forth, all of which was well known to the plaintiff at the time of the pretended sale or transfer herein referred to.

13th. That said defendant alleges that the said plaintiff
16 has not nor did not at any time purchase or own the good will of any business or firm in Canton, D. T.; and said defendant denies that he is assisting any unfounded or illegal claim against the plaintiff or any other person; and defendant further denies that the plaintiff will or can possibly suffer any consequential or other further damages than the value of the goods levied upon, with interest, in any event whatsoever.

14th. The defendant further avers that plaintiff, for several years heretofore, to wit, about three years, has been in the employ of a firm in Canton buying stock, grain, &c., and previous to that time was either in the employ of different parties or as simply a local insurance agent, and done no other business except, perhaps, mechanical work; that he had no experience in the business of selling merchandise, as defendant is informed and believes, and said pretended sale or transfer was not made with a view or with the intent that he should continue in the said business; and this defendant alleges that plaintiff cannot possibly recover or be entitled to suffer any further or other damage in consequence of the said levies herein referred to than the value of said goods, wares, and merchandise as levied upon, with interest.

15th. That said defendant denies each and every allegation in said complaint contained not hereinbefore denied, controverted, or otherwise answered.

16th. The said defendant resists the restraining order herein made, and asks that the same may be vacated and set aside.

Wherefore defendant demands judgment—

1st. That the restraining order made herein on behalf of the

plaintiff may be vacated and set aside, and that he may be denied further orders of like character.

2d. That the complaint of the plaintiff herein may be dismissed.

3d. That the defendant may be awarded his costs in this action, and that he may be granted such further relief as to the court may seem just and equitable.

Dated Dec. 17th, 1883.

KENNEDY BROS.,
F. R. AIKENS &
O. S. GIFFORD,
Attorneys for Defendant.

TERRITORY OF DAKOTA, }
County of Lincoln, } *ss:*

J. M. North, being first duly sworn, deposes and says that he is the defendant in the foregoing action; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except those matters stated upon information and belief, and as to those matters he believes it to be true.

J. M. NORTH.

Subscribed and sworn to before me this 18th day of Dec., 1883.

M. E. RUDOLPH,
Notary Public.

[Endorsed:] — of Dakota, Lincoln county. In district court. Filed Jan. 12, 1884. Wm. M. Cuppert, clerk district court.

17 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court within and for Lincoln County.

ANDREW PETERS, Plaintiff, }
against }
J. M. NORTH, Defendant. }

TERRITORY OF DAKOTA, }
County of Lincoln. }

J. M. North, being duly sworn, deposes and says that he is the defendant above named and has been instructed by the attaching creditors referred to in his answer herein as having sued out writs of attachment, and which writs were received by him subsequent to November 19th, 1883, to hold, by virtue of said writs, the stock of goods, wares, and merchandise mentioned in the complaint of plaintiff; that deponent can find no other property upon which to levy said writs, after due and diligent search and inquiry, and that he is unable to determine whether the restraining order granted herein forbids or is intended to forbid defendant from levying upon said property by virtue of and to satisfy the said warrant of attachment received by him subsequent to the granting of said order or not.

[SEAL.] J. M. NORTH.

Subscribed and sworn to before me this 18th day of December, 1883.

M. E. RUDOLPH,
Notary Public.

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS }
vs. }
J. M. NORTH. }

The above-entitled cause coming on, before the Hon. A. J. Edgerton, presiding judge of the 2d judicial district, at chambers, at Yankton, D. T., on the 6th day of December, 1883, to be heard, upon motion of the defendant above named that the undertaking required to be given by the plaintiff be fixed at the sum of ten thousand dollars, O. S. Gifford appearing for defendant and Bartlett Tripp appearing for plaintiff, it is ordered and adjudged that the undertaking required to be given by plaintiff herein be increased and fixed at the sum of seven thousand five hundred dollars, and the order heretofore made herein is hereby amended to conform to the said amendment.

Done at Yankton, D. T., this 6th day of December, 1883.

A. J. EDGERTON, *Judge.*

To which ruling and order the plaintiff duly excepted; which exception was allowed.

—— ——, *Judge.*

18 TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
against }
J. M. NORTH, Defendant. }

Now comes the above-named defendant, by O. S. Gifford, his attorney, and moves, upon the amended affidavits and all the papers in the case, that the undertaking required to be given by plaintiff be fixed at the sum of ten thousand dollars.

Dated Dec. 5th, 1883.

O. S. GIFFORD,
Attorney for Def't.

— the — affidavits and all the papers in the within-entitled cause let the plaintiff show cause, before me, at the court-house in Yankton, D. T., on the 6th day of December, 1883, at two o'clock in the afternoon, why the within motion should not be granted.

Dated Dec. 6th, 1883.

A. J. EDGERTON, *Judge.*

Filed Dec. 8th, 1884.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, }
4th Judicial District. }

In the District Court within and for Lincoln County.

ANDREW PETERS, Plaintiff, }
against
J. M. NORTH, Defendant. }

TERRITORY OF DAKOTA, }
County of Lincoln. }

J. M. North, being duly sworn, deposes and says that he is the above named —; that he has been instructed by the attaching creditors referred to in his answer herein as having sent out writs of attachment, and which writs were received by him subsequent to November 19th, 1883, to hold, by virtue of said writs, the stock of goods, wares, & merchandise mentioned in the complaint of plaintiff; that defendant can find no other property upon which to levy said writs after due and diligent search and inquiry, and that he is unable to determine whether restraining order granted herein for*feits* or is intended to for*feit* defendant from levying upon said property by virtue of and to satisfy the said warrants of attachment received by him subsequent to the granting of said order or not.

J. M. NORTH.

Subscribed and sworn to before me this 18th day of December, 1883.

M. E. RUDOLPH,
Notary Public.

Filed for record Jan. 12, 1884.

WM. M. CUPPETT,
Clerk District Court.

19 TERRITORY OF DAKOTA, }
Fourth Judicial District, County of Lincoln, } ss:

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

SIR: Please to take notice that upon the annexed answer, affidavit, and upon all the papers in the above-entitled cause, with a copy whereof you are hereby served, a motion will be made before the Hon. A. J. Edgerton, presiding judge 2nd judicial district, at the court-house, in the city of Yankton, in the county of Yankton, D. T., on the 21st day of December, 1883, at 5 o'clock p. m. on that day, or as soon thereafter as counsel can be heard, for an order so far modifying the restraining order granted herein against defendant *so* that said order will designate definitely as to what attachments or other writs said order refers *to* and against which it effects, and as to what writs and acts of defendant said order refers in forbidding to interfere with said property described in the complaint of

plaintiff, or for such other or further relief in the premises as shall be just.

Dated the 18th day of December, 1883.

KENNEDY BROS.,
F. R. AIKENS AND
O. S. GIFFORD,
Attorneys for the Defendant.

To K. C. Stabeck, Esq., attorney for plaintiff.

Filed January 12th, 1884.

WM. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, }
4th Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
against }
J. M. NORTH, Defendant. }

On reading the complaint in this action, duly verified, also the affidavits of Andrew Peters and others on the part of the plaintiff and F. A. Gale and others on the part of the defendant, upon an order to show cause made by me in this case and returned before me, after hearing Bartlett Tripp, Esq., for the plaintiff, and Shannon and Kennedy, for the defendant, no sufficient cause to the contrary being shown, it is ordered that defendant and his attorney, counselors, agents, and assistants and each and every of them, under the penalties by law prescribed—that he, they, and each and every of them do absolutely desist and refrain from holding or attempting to hold possession of or in any manner intermeddling or interfering with the goods and property described in said complaint by virtue and in pursuance of certain warrants of attachment now in his hands for execution issued at the suit and in favor of the following parties against P. M. Lund & Co. in certain several actions commenced in favor of each of said parties, viz., Van Keuren & Floyd, A. G. Leonard & Co., E. C. Palmer & Co., Wyman, Mullen & Van Dyke, Van Keuren & Floyd, Forepaugh & Tarbox, Bentley, Jaquith & Co., J. V. Farwell & Co., J. H. Rice & Freedman, James Beach, George B. Rowell, Sweet, Dempster & Co., Myers, Tice & Co., Henzenger Tobacco Co., J. Oehrfelder, Emerson, Sherman & Co., Jacob Fernkes & Bro., Preston & Mott, and any further writs of attachment
20 hereafter placed in his hands for service in the suit of any party against the property of P. M. Lund & Co., and that the plaintiff be permitted and allowed to take hold and maintain absolute and complete control and possession of said personal property without let or interference on the part of said North, the defendant, his deputies, agents, assistants, counselors, and attorneys, and the said order to show cause is hereby made absolute on the making and filing of a written undertaking, pursuant to the statute and practice of the court, to the effect that he will pay to said defendant such

damages, not exceeding the sum of seven thousand five hundred dollars, as he may sustain by reason of this injunction if the court shall finally decide that the plaintiff was not entitled thereto until the court shall make further order in the premises.

And it is further ordered and adjudged that all former orders made herein are amended and shall conform herewith.

Done at Yankton, D. T., this 2nd day of January, 1884.

By the court:

A. J. EDGERTON, *Judge.*

TERRITORY OF DAKOTA, }
County of Lincoln, } ss:

I hereby certify that in said county on this 18th day of January, 1884, I personally served the within order upon J. M. North personally by handing to and leaving with him a true copy thereof.

WARREN CLARK,
Coroner in and for Lincoln County, D. T.,
Coroner of Lincoln County, Dakota.

Fees, service	60
Mileage	20
Copy	60
	$1 40

TERRITORY OF DAKOTA, }
4th Judicial District. }

In the District Court for and within Lincoln County.

ANDREW PETERS, Plaintiff, }
against }
J. M. NORTH, Defendant. }

Now comes the above-named defendant, by his attorneys, Messrs. Kennedy, Aiken & Gifford, at the close of the evidence, and moves the court that the jury be instructed to find for the defendant for the following grounds, to wit: That there is no evidence that any pretended, informed, or unauthorized writs have been issued nor any such writs have been received by defendant, nor that any such writs have been or are about to be issued.

That there is no evidence that defendant has levied excessively upon any property, or that he is attempting to vex, annoy, or oppress the plaintiff, nor that he has disregarded his duty nor is about to disregard his duty in connecting therewith, nor that he has or is about to enter maliciously into the store of the defendant, nor that he has in any manner disregarded his duty as sheriff in connection with the subject-matter of this action, nor that he has acted in any manner collusively with any persons to oppress or in any manner wrong the plaintiff.

MESSRS. KENNEDY BROS., GIFFORD & AIKENS,
Attorneys for Defendant.

This motion denied.

C. S. PALMER, *Judge.*

Filed Feb. 7th, 1885.

WM. M. CUPPETT.

21 TERRITORY OF DAKOTA, } ss:
4th Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

The jury in the above-entitled cause find for the plaintiff on all of the issues.

A. P. DIXON, *Foreman.*

Filed Feb. 7th, 1885.

W. M. CUPPETT, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District in and for said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

Motion to Dismiss the Action, and also for Resubmission.

Now comes the defendant and moves the court as follows:

First. For an order dismissing the temporary injunction heretofore granted in this action on the 2nd day of Jan., 1884, and also to dismiss the complaint and action of the plaintiff for the following reasons, to wit: First, there was no evidence offered and introduced at the trial of this action tending to prove that William M. Cuppett, as clerk of this court, on the 15th day of November, A. D. 1883, or at any other time, issued any informal and authorized or pretended writs of attachment as clerk of this court, or that he threatened to or was about to issue as clerk of this court any such informal or pretended writs of attachment for any purpose, and especially not for the purpose of vexing and annoying the plaintiff.

Third. That there was no evidence adduced at the trial of this action tending to show that the defendant excessively levied any pretended writs of attachment directed to him to be served upon and against the property of P. M. Lund.

4th. That there was no evidence adduced at the trial tending to prove that the defendant excessively levied any warrants of attachment against the goods of the plaintiff; that there was no evidence adduced at the trial tending to show that the defendant levied any writs of attachment on the property of the plaintiff with any malice against the plaintiff, or that the sheriff, the defendant, conspired with any person or allowed himself to be used by any person in his office for the purpose of oppressing and damaging the plaintiff.

VI. That there was no evidence adduced at the trial tending to show that the stock levied upon was — a perishable nature or that the plaintiff would suffer any irreparable injury by or in consequence of the said goods being levied upon other than such as a court law would afford a full compensation in damages.

V. That there was no evidence adduced at the trial tending to prove that the official bond of the defendant was not sufficient to fully protect the plaintiff for any amount of damages that he might recover against the defendant in an action of trespass for the taking of the said goods; that there is an entire absence from the record of the proper parties defendant in this action, as shown by the evidence, uncontradicted, adduced at the trial.

The evidence at the trial, adduced and uncontradicted, clearly shows that the defendant was at the time of the commencing of this action and the issuing of said injunction the duly
22 qualified and acting sheriff of Lincoln county, Dakota.

That he had in his hands for service large number of valid and formal warrants of attachment issued from the office of the clerk of this court and from the clerk of the court of Davison county, Dakota, in and for the second judicial district, and that all the said warrants of attachment were issued in actions wherein one P. M. Lund and Co. were defendants and various parties plaintiffs; that all of the said warrants were directed to the defendant as sheriff of Lincoln county, Dakota, for service and execution, and that they directed the defendant to levy on the property of the said P. M. Lund and Co., to hold the same to satisfy any judgment the plaintiffs in the said action might obtain against the said P. M. Lund and Co.

That the stock of goods levied on by the defendant *were* taken into his possession by virtue of levies under the said warrants of attachment and as the property of the said P. M. Lund and Co.; that the defendant was directed to levy on the said stock by attaching creditors, and that every act the defendant did in reference to said stock was under and by virtue of said warrants of attachment and in the line of his duty as an officer of this court and without any malice against the plaintiff; that there are a great many attaching creditors plaintiffs in the said actions and warrants of attachment and attachment proceedings against the said P. M. Lund & Co., and were parties of interest in the said levy and the said stock of goods levied upon by this defendant under said warrants and in the subject-matters of this action, and that the said attaching creditors are the proper and indispensable parties defendant to this action, and none of the same are made parties hereto, and under the evidence in this action adduced at the trial this defendant is in no manner a proper party to this action.

The defendant further moves this court to dissolve the temporary injunction heretofore granted in this action and to dismiss the complaint of the plaintiff and his action for the reason that the plaintiff has withdrawn from his complaint all the allegations thereof so far as they in any manner charge malice on the part of the defendant, and the said complaint does not state facts sufficient to consti-

tute a cause of action or to entitle the plaintiff to the relief he asks for in his complaint.

That if the court refuses to dismiss the complaint of the plaintiff and to dismiss the action on the above motion and showing, then the defendant asks for a new trial in this action and to vacate the verdict of the jury returned herein for the following reasons, to wit:

I. For improper conduct on the part of the plaintiff and his attorney, J. W. Taylor, in this:

That both the said plaintiff and his said attorney, J. W. Taylor, persuaded and procured one L. B. Odean, a material witness for the defendant, to remain out of the jurisdiction of this court, so that the defendant could not procure his evidence and could not subpœna him to attend at the trial of this action, as is shown by the affidavit of said L. B. Odean, hereto attached and made a part hereof and marked Exhibit "A."

II. For improper conduct on the part of the said J. W. Taylor, as the attorney of the said plaintiff, in this: The said J. W. Taylor, as the attorney of the said plaintiff, induced and persuaded the said L. B. Odean to conceal material evidence important to be known
23 by the defendant to show fraud on the part of the said Peters and Lund in the sale of the said stock of goods and the disposition of the proceeds thereof.

III. For the reason that the defendant, since the trial of this action at the last term of this court, has discovered evidence material to prove the issues on his part, and which evidence he has used all reasonable diligence to procure for the trial of this action, but on account of the improper conduct of the plaintiff and his attorney, J. W. Taylor, he was prevented from discovering; which improper conduct and the said evidence *is* shown by the attached affidavits of L. B. Odean and J. S. Aandahl, and all the improper conduct and actions of said Taylor and the plaintiff *is* shown by the said affidavits. The diligence used by the defendant in procuring the said evidence is shown by the affidavit of C. B. Kennedy, hereto attached and made a part hereof.

KENNEDY BROS. AND
O. S. GIFFORD,
Attorneys for Defendant.

TERRITORY OF DAKOTA, }
County of Lincoln, } *ss:*

Fourth Judicial District, in District Court in and for Said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

I, L. B. ODEAN, being first duly sworn, depose and say that I reside in Suttler township, of Sioux county, Iowa; that on the 16th day of November, 1883, I was acquainted with P. M. Lund, of Canton, Dakota, and had been acquainted with him for a long time prior to that time; that on the said day, in the evening, at about 8 o'clock

p. m., he came to my house in a hurry and greatly excited, and informed me that he had sold out his stock of goods at Canton and had been away East, and that he thought he had been followed by robbers, and that he had valuable papers on his person, and to save them he had sent them to me in a letter to Beloit, Iowa, which would now be there or would come in a few days; that the said letter contained a bond for a deed to half section of land for three thousand two hundred dollars, and signed by J. W. Taylor and made payable to J. S. Aandahl, of Barnes county, Dakota, and also three promissory notes of J. W. Taylor for one thousand dollars each and due and payable in thirty, sixty, and ninety days, respectively; that the said notes were made by the said J. W. Taylor to said J. S. Aandahl, and that there was also a draft on a New York bank in the said letter for one thousand dollars.

That the creditors of P. M. Lund learned of the arrival of the said letter before its delivery to me and made an effort to levy on the same as the property of the said P. M. Lund and the proceeds of the sale of the said Lund's stock to Andrew Peters, at Canton, Dakota; that for more than a week the sheriff of Lincoln county, Dakota, and the constables at Beloit, Iowa, watched the delivery of the said letter, with their attorneys, so as to levy on the same.

That J. W. Taylor, as the attorney of Lund and Peters, as this deponent believed at the time, came over to Beloit and assisted in preventing the said officers from levying on the said letter, and the said J. W. Taylor assisted in concealing the contents of the said letter from the creditors.

That at that time I told the said J. W. Taylor what was in the said letter, and he informed me that he knew what was in the said letter, and that it contained all the property that Lund had
24 in the world, and if the creditors should levy on it the said Lund would be ruined; that at the said time I procured the possession of the said letter while the officers were watching to levy on it, and by arrangement with the said Taylor the said Taylor took the said letter from my pocket, and, as he informed me, went to Canton and opened the same and took the said notes, bond, and draft from the said letter and filled the said letter up with blank paper and returned the same to me, and, under the advice of the said Taylor, I delivered the same up to Justice Tillotson, at Beloit, Iowa, to be by him delivered over into the hands of one O. S. Gifford, well knowing from the statements of the said Taylor that the said contents had been abstracted from the said letter and it refilled with the said blank papers.

That at the time of procuring the said letter from the post office at Beloit, Iowa, I was arrested for the assisting of P. M. Lund in concealing his property with the intent to defraud his creditors.

That J. W. Taylor defended me at that time and procured the possession *for* the said letter and never made any charge to me for his services; that he promised to pay all expenses and charges that I had been occasioned on account of resisting the falling of the said letter into the hands of the officers on warrants against the said Lund; that at the time of taking of the said letter from the post office at Beloit

Iowa, it was understood between us all that the contents, as before stated, was the property of Mr. Lund and was of the value of seven thousand dollars, and that the contents of the said letter would be damaging testimony against Peters in his suit against North if it should be found out what was in the said letter; and it was understood that the letter's contents was the evidence of the manner of the payment by Peters to Lund of the sale of Lund's stock of goods to him, and the fight was all made on the part of Taylor, as we understood at the time, as the attorney and agent of Lund and Peters; that afterwards there was an investigation of the circumstances of the said sale at Eden, in Lincoln county, Dakota, of the transactions of the said sale and of the said letter in a case where the Territory of Dakota was plaintiff and P. M. Lund and Andrew Peters were defendants, before A. J. Warner, a justice of the peace of Lincoln county, Dakota, on a criminal charge for being parties to a fraudulent conveyance of the stock of goods by the said Lund to the said Peters; that J. W. Taylor defended both Peters and Lund, as I understood, and I was called by the plaintiff to testify in the said case, and at the request of the said Taylor I stated that the said letter had not been out of my possession from the time I took it from the post office until it was delivered up to Tillotson; that he explained to me that he, Taylor, was the attorney of myself, and that his possession was my possession, and that I could truthfully testify that it had not been out of my possession, and, believing the statements of Taylor as to the possession of an attorney being the possession of the client, I did so testify for him, so as to throw the other side off from the true facts in relation to the latter; that I testified in the said action that Lund had told me that there was valuable papers in the letter, but at the suggestion and demand of the said Taylor changed the said testimony to read that they think there is valuable papers in the letter; that Lund and Peters were both interested in my testimony, and, to prevent me from testifying, that when the court was held at Canton in August, 1884, J. W. Taylor asked me to stay on the Iowa side of the Sioux river and out of the jurisdiction of this court, so that I could not be subpœnaed as a witness by the defendant; that, acting on the request of the said Taylor and his assurance that he would pay me for my time that I lost in remaining from the jurisdiction of this court, I did stay away and did not come into the jurisdiction of this court during its session, in August, in 1884.

That at the January term of this court, 1885, both J. W. Taylor and Andrew Peters requested me to stay on the Iowa side of the river and not come into the jurisdiction of this court or I would be subpœnaed; that during the session of this court in January Andrew Peters came down to my place in Sioux county, Iowa, and requested me to stay away from Dakota during the term of the court; that my testimony was damaging to him and he wanted me to stay away; that several times during the January term of this court Mr. Peters came to Beloit and requested and implored me to stay away from Dakota during the term of the court, for if I would come over to Dakota I would be subpœnaed, and he assured me that Taylor would

pay me for the time and trouble that I was occasioned and lost; that J. W. Taylor held up to me that I had sworn false at Eden, and if I should come and testify to the truth that he would have me arrested, and that I would be sent to the penitentiary, but if I should stay away he would pay me and would be my friend; that, relying on the promises of the said Taylor and fearing that he would prosecute me for the coloring that I gave my testimony at Eden, I was afraid to come to Dakota and was afraid to come and be a witness, fearing that the said Taylor would take advantage of the said testimony and would have me arrested and make me great trouble, and he had made so many threats against me that I was afraid to testify or to come and be a witness; that the creditors represented by Kennedy Brothers sent down and requested me to come up and testify to the truth, but I was afraid to do so, fearing the threats of the said Taylor; that during the term of the court I did come up to Canton once and went to the office of J. W. Taylor, and as soon as he saw me he secured me from coming into the Territory and at once run me back over the Sioux river and would not allow me to remain in Canton; that afterwards the said Taylor paid me twenty-seven dollars as payment for my staying out of the Territory of Dakota during the session of the court; that J. W. Taylor came to Beloit, Iowa, in the night time and paid me the said money and tried to prevail on me to come up to Canton and swear false in these Lund matters, so as to corroborate statements that he had made under oath in the probate court.

That at the time the said letter heretofore mentioned was in the post office at Beloit, Iowa, the said Taylor tried to prevail on me to go and take the same from the post office and abstract the said notes, bond, and draft and fill the letter with blank paper and deliver it up, so as to deceive the creditors of the said Lund.

L. B. ODEAN.

Subscribed and sworn to before me this 18th day of March, 1885.

[SEAL.] J. W. CARTER,
Clerk — Court.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in District Court in and for the Said County.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Defendant.

26 I, J. S. AANDAHL, being first duly sworn, depose and say that I am the same J. S. Aandahl who testified as a witness at the trial of this cause for the defendant, and I thought that I had informed the attorneys all about the facts of my connection and knowledge of the Lund and Peters sale of their stock of goods; that after the said term of the court at which this cause was tried there was an investigation of the same matter in the probate court of Lincoln county, Dakota, and in the said investigation the defendant in

said proceeding, J. W. Taylor, produced a receipt in evidence signed by me and given to the said P. M. Lund, wherein I acknowledged the receipt from the said Lund of three thousand two hundred and fifty dollars; that the production of the said receipt brought to my mind all the transactions in connection therewith, which were as follows, to wit: That in the latter part of January, 1884, I, in company with P. M. Lund and J. W. Taylor, was at the office of the said J. W. Taylor, and they, Lund and Taylor, as I understood, were talking about the sale of the Lund stock to Peters and the pending litigation between Peters and North; that they wished to show on the trial of the said case where the proceeds of the sale went to, and in order to show up they prevailed on me to give a receipt for three thousand two hundred dollars, the same above mentioned, and a copy of which is hereto attached and made a part of this affidavit. Lund there in presence of Taylor explained to me that as the land or bond for a deed testified to by me was in my name I should give the said receipt to Lund to show that he had paid me so much money, and that I should date said receipt back to the first of December, 1883, and that I should date it at my farm in Barnes county, Dakota, so as to show the creditors that it was not made at Canton while I was here.

That it was made at Canton, as before stated, in the latter part of February, 1884, and in the office of the said J. W. Taylor, and was made for the purpose of being used in the said case and for the purpose of deceiving the creditors of the said Lund and to show up the transactions of the said sale.

That the making of the said receipt and the concealing of the said papers, to wit, bond and drafts and notes of J. W. Taylor, was for the express purpose of deceiving the creditors of the said Lund and for the purpose of preventing them from procuring the evidence of the said sale of the said stock of goods of P. M. Lund to Andrew Peters; that the said Lund did not pay me one dollar for the said receipt, and I received no money from Lund, and for which the said receipt was given, as before stated, as a blind; that at the time of the giving of the said receipt my recollection is that Lund at once and in my presence handed it over to Taylor, and that he, the said Taylor, kept the same in his possession.

J. S. AANDAHL.

Subscribed and sworn to before me March 18th, 1885.

[SEAL.] J. W. CARTER, *Clerk Court.*

Filed — day of ——, 188–, —— Territory of ——.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District Court in and for the said County.

ANDREW PETERS
vs.
J. M. NORTH, Defendant.

I, C. B. KENNEDY, being first duly sworn, depose and say that I am one of the attorneys for the defendant in the above-en-
27 titled action, and have been such an attorney since the commencement of this action; that when the action first commenced there was afterwards and nearly the same time a criminal proceeding commenced against the plaintiff and P. M. Lund for the disposing of the said stock of goods mentioned in the complaint; that the deponent was an attorney for the prosecution in the said action, and the said L. B. Odean was a witness in the said action on the part of the prosecution.

That the deponent did all he could to procure the true facts to which the said witness had knowledge, but was unable to do so, he dodging the question and allowing his memory to fail him.

That the deponent had charge of working up the evidence for the defendant. The defendant, being a sheriff and acting as such, had not as much knowledge of the facts in the case as the deponent; that before this court, and in time to have the said L. B. Odean as a witness, this deponent sent a man over into Iowa to try and get the said L. B. Odean to come over and be a witness at the trial of the case on the part of the defendant, but could not prevail on him to cross the river, and it was only after the trial of this case and when proceedings being had in the probate court of this county was under investigation as to the concealment by the said J. W. Taylor of the assets of the said estate of P. M. Lund & Co. — did discover that the said L. B. Odean and J. S. Aandahl had knowledge of attempts by the said J. W. Taylor to cover up and conceal the evidence and the facts in the matter, as shown by the affidavits of L. B. Odean and J. W. Taylor; that the deponent, as the attorney of the defendant, inquired of the said L. B. Odean at the said investigation — to the said criminal charge, and could not procure from him that he knew of the improper conduct of the said Taylor in reference to the letter mentioned by him in his affidavit, and the said J. S. Aandahl failed to remember the fact of J. W. Taylor manufacturing evidence, as stated by said Aandahl in his affidavit, until the same was developed in the proceedings in the said probate court.

Dated March 27th, 1885.

C. B. KENNEDY.

Subscribed and sworn to before me this 27th day of March, A. D. 1885.

J. W. CARTER, [SEAL.]
Clerk of Court.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in District Court in and for the said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

To the defendant above named and to Bartlett Tripp and J. W. Taylor, his attorneys of record:

Take notice that the defendant will move the court in the above-entitled action for an order dismissing the temporary injunction heretofore granted in this action, and also for an order dismissing the complaint of the plaintiff and dismissing the action, and for an order vacating and setting aside the verdict and finding of the jury returned in this action, and for a new trial on the issue of fact submitted to the jury; that the defendant's said motion is hereto attached and made a part of this notice, and the grounds of said motion are fully stated in the motion attached.

That the defendant will bring the said motion on for hearing before the Hon. C. S. Palmer, judge of the fourth judicial district of Dakota, and the judge who tried the action at his chamber in the city of Sioux Falls, Dakota, on Monday, the 13th day of
28 April, A. D. 1885, at one o'clock p. m. of said day, or as soon thereafter as counsel can be heard, and you are required to be present if you deem proper. The defendant's said motion will be made on the papers on file in the action, the minutes of the court, the notes of the stenographer made at the trial, and all the papers in the case, and on the affidavits of L. B. Odean, J. S. Aandahl, and C. B. Kennedy, copies of which you are herewith served and attached.

Dated at Canton, Dakota, this 27th day of March, A. D. 1885.

KENNEDY BROS. AND O. S. GIFFORD,
Attorneys for Def't.

Service and receipt of copy admitted this 28th day of March, 1885.

J. W. TAYLOR,
For B. TRIPP,
Attorney for Plaintiff.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District Court in and for the said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

Motion for New Trial.

Now comes the defendant, after the verdict of the jury in the above-entitled case, and moves the court that the verdict of the jury

be set aside and a new trial be granted for the following reasons, to wit:

1. That there was no evidence tending to prove that the defendant acted with any malice against the plaintiff in the levying of the warrants of attachment referred to in the complaint.

2. There was no evidence adduced on the trial tending to prove that the defendant conspired with any person or party to oppress or injure the plaintiff.

3. There was no evidence adduced at the trial tending to prove that the plaintiff would suffer any irreparable injury from the attachment of the stock in question.

4. The verdict is contrary to the clear weight of the evidence in this: The evidence adduced at the trial clearly shows that P. M. Lund sold the stock of goods in controversy to the plaintiff Peters for the purpose of defrauding, hindering, and delaying his creditors in the collection of their debts, and that J. W. Taylor was the agent of the plaintiff and well knew of the fraudulent purpose of Peters and Lund and participated therein, and that Peters, through the said Taylor, had full notice of the said fraud and participated therein. That the said verdict is contrary to the instructions of the court in this: That the court instructed the jury that if the jury found that Taylor was the agent of Peters knowledge of fraud in Taylor was knowledge to Peters.

5. That instructions of the court to the jury were given orally, and the jury misunderstood the instructions of the court, as is shown by the affidavits hereto attached, and were it not for such misunderstandings the verdict would have been for the defendant.

6. There was no evidence adduced at the trial tending to show that the warrants of attachment under which the defendant acted were either pretended or void.

7. That Orlando Alexander, one of the jurors that tried the said case, was sick, and when he retired to the jury-room to delib-
29 erate on said verdict he was so unwell that he could not consider the matter and did not consider the verdict; that he did not agree to the said verdict, and only suffered the other jurors to return the said verdict because he was unable to remain in the jury-room to consider the verdict, and he did not agree to the said verdict of his own will, as is shown by his affidavit, hereto attached and made a part of this motion.

That the court erred in submitting to the jury the ownership of the property mentioned in the complaint.

That the defendant further moves the court that the temporary injunction heretofore granted by this court on the 10th day of December, 1883, be dissolved for the reason that there was no evidence adduced by the plaintiff tending to show any malice, oppression, or fraud on the part of the defendant, and there was no evidence adduced that the plaintiff would suffer any irreparable injury; that there was no evidence adduced upon the trial of said cause to authorize the granting of said order, and the said evidence clearly shows that the plaintiff was not entitled thereto.

There was no evidence adduced tending to show that the warrants

of attachment under which the defendant acted were either pretended or void.

KENNEDY BROTHERS AND O. S. GIFFORD,
Attorneys for the Defendant.

To the above-named plaintiff and Bartlett Trip, his att'y:

Take notice that the defendant will move the court for an order vacating the verdict and for a new trial in the above-entitled action for the reason set forth in the foregoing motion; that the foregoing motion is the defendant's motion for a new trial, and the same will be brought on for trial and hearing before the court on Wednesday, the 18th day of March, A. D. 1885, at the court-house in the city of Canton, in said Lincoln county, on the opening of the court on said day or as soon thereafter as counsel can be heard.

That said motion will be made on the papers on file in the case, on the stenographer's notes of evidence taken at the trial, and on the minutes of the court and on the affidavits hereto attached, and you are required to be present at the hearing of the said motion if you deem proper.

Dated at Canton, Dakota, this 12th day of February, 1885.

KENNEDY BROTHERS AND O. S. GIFFORD,
Attorneys for Defendant.

TERRITORY OF DAKOTA, }
County of Lincoln, } *ss:*

Fourth Judicial District, in District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

I, ORLANDO ALEXANDER, being first duly sworn, depose and say that I was one of the jury that tried the above-entitled case; that during the trial of the said case I was very unwell, so much so that it was almost impossible for me to give attention to the consideration of the case that it required.

That when I retired with the rest of the jury to our room to consider our verdict I was so unwell that it was impossible for me to remain in the room any great length of time without great inconvenience; that I voted against the verdict for the plaintiff, and were it not for being so unwell I would never have consented to such a verdict; that it appeared that the jury would be out for some time unless I gave in, and it was impossible for me to remain longer in the jury-room without great inconvenience on account of the condition of my health; that if I had done so I could not have considered the verdict, and, in fact, I did not consider the matter on account of my health; that during the trial I was so unwell, but I did not inform the counsel on either side thereof, hoping that I could get through with the trial, but when I went to the jury-room it became impossible for me to remain longer therein without great inconvenience and to consider the verdict, and that I

gave in to the verdict returned, not because I agreed to it, but that for the reason that it was impossible for me to remain longer in the room without great inconvenience and injury to my health, and I submitted in order to get out. At the time I was satisfied that the sale of the stock from Lund to Peters was fraudulent, and that Taylor was the agent of Peters and well knew of Lund's fraud and participated therein; and I further state that were it not for my health my verdict would have been for the defendant.

ORLANDO ALEXANDER.

Subscribed and sworn to before me this 11th day of February, 1885.

W. M. SHELDON,
Notary Public in and for Lincoln Co., D. T.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District Court in and for said County.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Defendant.

I, F. P. SMITH, being first duly sworn, depose and say that I am a physician and surgeon duly licensed to practice medicine; that on Friday or Saturday, Feb. 6th or 7th, I was called on by Orlando Alexander to prescribe for him, as he was suffering from a severe attack of malaria, there being fever and a chill, and he appeared to be suffering pain in his back and limbs, and also some headache; that in his condition I considered it very injurious for him to be confined in a close room with a jury of twelve men, or in any close place.

F. P. SMITH.

Subscribed and sworn to before me this 12th day of February, 1885.

OSCAR E. REA, [SEAL.]
Notary Public.

Filed March 21st, 1885.

J. W. CARTER,
Clerk District Court.

Receipt of copy admitted this 12th day of Feb., A. D. 1885.

B. TRIPP,
Plaintiff's Att'y.

TERRITORY OF DAKOTA,
Fourth Judicial District,

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Defendant.

The attached motion of the defendant for a new trial and setting aside the verdict in the above cause and for a resubmission and for a dismissal of the preliminary injunction therein and for judgment coming to be heard before me, the judge of said court, at chambers, at Sioux Falls, D. T., on the 13th day of April, 1885, at one o'clock p. m. of said day, upon notice and motion, O. S. Gifford and Kennedy Brothers appearing for the said defendant and Bartlett Tripp and J. W. Taylor appearing for the said plaintiff, after hearing the arguments of the respective parties, and the court being fully advised and satisfied in the premises, it is hereby ordered that the said motion be, and the same *are* hereby, denied.

Done in said district, at Sioux Falls, D. T., this 13th day of April, 1885.

By the court:

C. S. PALMER, *Judge.*

31 The defendant duly excepts to all rulings and orders of the court above set forth.

C. S. PALMER, *Judge.*

April 13th, 1885.

Filed January 8th, 1886.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA,
County of Lincoln, ss:

In District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Defendant.

Findings of Fact, Conclusions of Law, and Order for Judgment.

This case came on for hearing at the regular term of this court, holden in the city of Canton, in said county, on the 7th day of February, 1885. One question of fact, namely, the ownership of certain property described in the complaint, was submitted to a jury by order of court and consent of both parties. Testimony was introduced by both plaintiff and defendant. The jury was charged by the court and retired for deliberation, and on the same day returned into court with a verdict in favor of the plaintiff upon the issue submitted. Afterwards, on the — day of ——, 1885, said cause was brought on for hearing upon a motion made by the defendant for

judgment, notwithstanding the verdict, vacating the injunction heretofore granted therein and for dismissal of the action upon the pleadings and the evidence as taken at the time of the trial of said question of fact. Motion for new trial was presented and overruled at the same time. The plaintiff also at the same time moved for a judgment upon the verdict. Plaintiff's motion for judgment upon the verdict and defendant's motion for judgment, notwithstanding the verdict, as above stated, were both presented at the same time, argued, and submitted to the court together, Kennedy Brothers and O. S. Gifford appearing for the defendant and Bartlett Tripp appearing for the plaintiff. The court, having due regard for the testimony taken in open court as aforesaid, and duly considering the same, and upon a due and full consideration of all the proof, exhibits, and files herein, and upon consideration of the verdict of the jury, the arguments of the counsel aforesaid, now makes and files the following findings of fact:

1. On the 13th day of November, 1883, one P. M. Lund was the owner of property described in the plaintiff's complaint.

2. On said 13th day of November, 1883, said Lund sold and conveyed the said property to the plaintiff, and he, plaintiff, entered into immediate possession thereof.

3. That said sale by Lund to Peters, the plaintiff, was made by Lund for the purpose of putting said property and proceeds thereof beyond the reach of his (Lund's) creditors and to defraud said creditors.

4. That the plaintiff at the time of purchase of said property from said P. M. Lund had no knowledge of Lund's purpose in the disposition of said goods.

5. That the defendant is, and at the time of said sale and transfer of said property was, sheriff of said Lincoln county; that on the 15th and 16th days of November, 1883, he, the said defendant, as sheriff aforesaid, levied upon the said property as the property of said
32 Lund, the same then being in the possession of the plaintiff, under and by virtue of certain warrants of attachment issued out of this court at the suit of various creditors of said Lund, being the same warrants of attachment the enforcement of which against said property is sought to be enjoined in this action.

6. That at the trial by the jury of the question of fact, as hereinbefore stated, all the allegations of fraud, malice, oppression, and collusion on the part of the defendant were stricken from the plaintiff's complaint on the motion of plaintiff's attorney.

7. That no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the sheriff of said property.

Conclusions of Law.

1. That the verdict of the jury heretofore rendered in this case on the question of fact, as herein stated, is but an advisory verdict and should be received and accepted only as such by the court in determining the issues in this action.

2. Under the pleadings and proofs herein the plaintiff is entitled

to relief demanded in his complaint; that the preliminary injunction heretofore issued should be made perpetual and final in accordance with the prayer of plaintiff's petition. Let judgment be entered accordingly.

Done at Sioux Falls this 8th day of July, 1885.

By the court:

C. S. PALMER, *Judge.*

[Endorsed:] Territory of Dakota, Lincoln county. In district court. Filed July 9th, 1885. J. W. Carter, clerk district court.

TERRITORY OF DAKOTA, *Fourth Judicial District,* } ss:

In District Court in and for Lincoln County, Fourth Judicial District.

ANDREW PETERS *vs.* J. M. NORTH. } Decree. Perpetual Injunction.

And now comes the said plaintiff in person and by his attorney and as well the said defendant in person and by his attorney, and thereupon the action came on for trial upon the issue joined, and the court thereupon, by consent and upon request of parties, submitted the issue of fact to a jury, and the said jury having returned into court and rendered a verdict in favor of the plaintiff upon the issue joined—

It is therefore ordered, adjudged, and decreed that the injunction heretofore granted in this action be, and the same is hereby, made perpetual, and the said defendant, his deputies, his agents and servants, and his successors in office, as sheriff of said Lincoln county, are hereby perpetually enjoined from in any manner interfering or meddling with the property of the plaintiff, Andrew Peters, set out and described in the complaint, and from seizing or taking possession thereof under or by virtue of any process in or to come into his hands against the property of P. M. Lund & Co.; and it is further considered and adjudged that the said plaintiff, Andrew Peters, have and recover of the defendant, J. M. North, his costs in the above said suit and in this behalf expended, taxed and allowed to be $95.80.

Done at Sioux Falls this 8th day of July, 1885.

By the court:

C. S. PALMER, *Judge.*

33 The defendant duly excepted to the above judgment of the court, and exception allowed.

C. S. PALMER, *Judge.*

Execution and further proceedings in this action are stayed for sixty days for preparing and settling bill of exceptions.

C. S. PALMER.

The defendant also duly excepted to the orders of the court overruling both the motion for a new trial and the motion for judgment, notwithstanding the verdict.

C. S. PALMER, *Judge.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

I, J. W. Carter, clerk of the district court of the fourth judicial district of Dakota in and for Lincoln county, do hereby certify that the foregoing findings of fact and conclusions of law were duly recorded in Judgment and Execution Book, vol. three, on pages 135 and 136, and the foregoing decree was duly recorded in the same book, on page 137, and all of the records of Lincoln county, Dakota.

Witness my hand and the seal of said court this 18 day of August, A. D. 1886.

[SEAL.]

J. W. CARTER,
Clerk Dist. Court, Lincoln Co., D. T.

[Endorsed:] Territory of Dakota, county of Lincoln. Andrew Peters *vs.* J. M. North. Decree. Final injunction. Territory of Dakota, county of Lincoln. In district court. Filed July 9, 1885. J. W. Carter, clerk district court.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in District Court in and for Lincoln County.

ANDREW PETERS }
vs.
J. M. NORTH. }

Now comes the defendant and excepts to the order of the court refusing to find the fourth finding of fact as asked by the defendant.

2. That the defendant excepts to the fourth finding of fact as found by the court.

3. The plaintiff excepts to the refusal of the court to finding the first conclusion of law asked by the defendant; and defendant excepts to the refusal of the court to find the second conclusion of law asked by the defendant; and defendant excepts to the refusal of the court to find the third conclusion of law as asked by the defendant.

4. The defendant excepts to the second conclusion of law as found by the court, and the above exceptions are allowed by the court.

Done this 8th day of July, 1885.

By the court:

C. S. PALMER, *Judge.*

Filed July 14, 1885.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in District Court in and for Lincoln County.

ANDREW PETERS }
vs.
J. M. NORTH. }

Order Extending Time to Prepare and Serve a Proposed Bill of Exceptions and Motion for New Trial.

It is ordered that the defendant shall have until the second Tuesday in November, 1885, *and* the same being the first day of the term of this court, at Sioux Falls, in and for Minnehaha county,
34 in which to prepare a motion for a new trial and to serve the same, to prepare and present a bill of exceptions in the above-entitled action, settle the same, and also to prepare and serve a motion of intention to move for a new trial; that the copies of the proposed bills of exceptions and the motion for a new trial shall be served on J. W. Taylor, attorney for the plaintiff, at least ten days before the said second Tuesday in November, 1885, and all further proceedings in this action *is* stayed until said date.

Done this 8th day of July, 1885.

By the court:

C. S. PALMER, *Judge.*

The defendant is allowed till Dec. 5th to present and settle a bill of exceptions and to settle the same, and the above order is extended till Dec. 15, 1885; and the defendant is allowed to Dec. 1st to file his brief.

Oct. 26th, 1885.

By the court:

C. S. PALMER, *Judge.*

July 14, 1885.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

Please take notice that on the first day of the October term, 1885, of said court in and for Turner county or as soon thereafter as counsel can be heard, on the 20th day of October, 1885, at the courthouse, in the city of Parker, county of Turner, Dakota Territory, we intend to move the Hon. C. S. Palmer, judge of said court, for a new trial upon the ground of errors of law occurring on the trial of said action and excepted to by the defendant; and upon the further

ground that the court omitted to find upon certain material issues in the said case, viz:

First. As to whether said action would prevent a multiplicity of suits.

Second. As to whether the plaintiff could not get adequate relief in pecuniary compensation.

Third. Whether or not it would be extremely difficult to ascertain the amount of compensation which — afford adequate relief in the action.

Fourth. The court failed to find whether the plaintiff gave any consideration or not.

Fifth. By refusing to find that the plaintiff was not an innocent purchaser from Lund in good faith.

Sixth. That the findings of fact do not support the conclusions of law or the judgment in the said action.

Seventh. That the judgment is erroneous.

Said motion will be based upon the pleadings and minutes of the court, the stenographic report of the testimony, findings of fact and conclusions of law as found by the court, the proposed findings of fact and conclusions of law as requested by the defendant, and the judgment in the said case.

KENNEDY BROS. AND
WINSOR AND SWEEZEY,
Defe't's Attorneys.

Due and personal service of the within notice by delivery to us, at Canton, on this day of a true, full, and perfect copy thereof is hereby admitted.

Dated at Canton, D. T., this 2nd day of October, A. D. 1885.

BARTLETT TRIPP,
Att'y for Plaintiff.

Filed October 27th, 1885.

J. W. CARTER,
Clerk of District Court.

35 TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs. } Motion for a New Trial.
J. M. NORTH, Defendant. }

Now comes the defendant, by Kennedy Brothers and Winsor and Sweezey, his attorneys, and upon the pleadings and minutes of the court, reference being had to the evidence and stenographic report of the testimony, findings of facts, and conclusions of law found by the court, the proposed findings of fact and conclusions of law as requested by the defendant, and the judgment in the said case and the papers used upon the trial, moves the court, pursuant to the

notice of intention duly served herein, to grant a new trial in said action upon the following grounds:

First. Error by the court in omitting to find whether said action would prevent a multiplicity of suits.

Second. Error by the court in omitting to find whether the plaintiff could not get adequate relief in pecuniary compensation.

Third. Error of the court in omitting to find whether or not it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief in the action.

Fourth. Error of the court in omitting to find whether the plaintiff gave any consideration or not.

Fifth. Error of the court in refusing to find that the plaintiff was not an innocent purchaser from Lund in good faith.

Sixth. Error in this, that the findings of fact do not support the conclusions of law or the judgment in this action.

Seventh. That the said judgment is erroneous.

KENNEDY BROTHERS AND
WINSOR AND SWEEZEY,
Attorneys for the Defendant.

Filed October 27th, 1885.

J. W. CARTER,
Clerk District Court.

TERRITORY OF DAKOTA, }
Fourth Judicial District. }

In the District Court in and for Lincoln County.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

And now, the 2nd day of December, A. D. 1885, the defendant's motion for a new trial coming on for hearing, and after due consideration thereof and upon the motion and application of the plaintiff, the court hereby finds the following facts and conclusions of law, in addition to those heretofore found, to wit:

1. That the purchase by plaintiff from P. M. Lund of the goods and chattels mentioned in the complaint included the good will of the business heretofore carried on by the said Lund under the name of P. M. Lund & Co.

Second. That the consideration for the said sale and transfer from the said P. M. Lund to the plaintiff was the sum of ten thousand three hundred and eighty dollars, then and there paid by plaintiff to said Lund, and that said consideration was fairly adequate.

Third. That at the time of the seizure by the defendant of the goods and chattels mentioned in the complaint and composing the former stock of P. M. Lund and Co. the plaintiff was in possession thereof as the owner, conducting a profitable business as a retail merchant, and that the acts and threatened acts of the defend-

ant under and by virtue of the said attachments mentioned
36 and referred to in the pleadings would, unless restrained by the court, necessarily destroy plaintiff's said business and deprive him of the probable profits that might be realized therefrom, and that it would be extremely difficult to ascertain or estimate the pecuniary detriment which the plaintiff would sustain thereby.

Fourth. That the said goods and chattels mentioned in the complaint and the plaintiff's said business comprised his entire property and pecuniary resources.

Fifth. That it is admitted by the pleadings and appears as a fact that at the time referred to in the complaint the defendant, as sheriff of Lincoln county, seized the said goods and chattels under and by virtue of sundry warrants of attachment sued out against the property of P. M. Lund; that the defendant as such sheriff then had in his hands many more such attachments against the said Lund which he threatened to levy upon the said goods and chattels, and that numerous other creditors of said Lund were then threatened to sue out and place in the hands of defendant additional warrants of attachment for the purpose of having the same levied upon the said goods and chattels as the property of the said Lund.

Conclusions of Law.

1. That it would be extremely difficult to ascertain the amount of compensation which would afford the plaintiff adequate relief from the acts done and threatened to be done by the defendant.

2. That it is necessary to restrain the acts threatened to be done by the defendant to prevent a multiplicity of judicial proceedings.

3. That the plaintiff is entitled to the relief demanded in the complaint.

By the court:

C. S. PALMER, *Judge.*

And now, the same day, the defendant, by his attorney, C. H. Winsor, duly excepts separately to each of the findings of fact above numbered one, two, three, four, and five, and to each of the conclusions of law numbered one, two, and three. The defendant further excepts to the filing of the additional findings of fact and conclusions of law, each of which exceptions are duly allowed.

By the court:

C. S. PALMER, *Judge.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In the District Court of the Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

The motion for a new trial regularly coming before the court

and he having held it under advisement until the 21st day of December, 1885, and being fully advised in the premises, ordered that said motion for a new trial be, and the same is hereby, denied.

Dated December 21st, 1885.

By the court:

C. S. PALMER, *Judge.*

To which order of the court the defendant duly excepts, which exception is allowed.

By the court:

C. S. PALMER, *Judge.*

Filed Dec. 30, '85.

J. W. CARTER, *Clerk.*

37 IN THE TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In the District Court of the Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

The time for settling the bill of exceptions is hereby extended till February first, 1886.

By the court:

C. S. PALMER, *Judge.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

I, H. N. Cooper, being first duly sworn, depose and say that the within order overruling a motion for a new trial and extending the time to prepare and present a bill of exceptions was placed in my hands for service on the 30th day of December, A. D. 1885, and on the same day I served the same personally on J. W. Taylor, the attorney for the plaintiff, by delivering to and leaving with him a true copy of the said order, at his office, in the city of Canton, Lincoln county, Dakota.

H. N. COOPER.

Subscribed and sworn to before me this 30th day of December, A. D. 1885.

B. KENNEDY,
Notary Public.

Filed December 30th, 1885.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

On due cause shown by the defendant, ordered that the time for settling the bill of exceptions in the above-entitled action be, and the same is hereby, extended to March 20th, 1886.

Feb. 27th, 1886, at Sioux Falls.

By the court:

C. S. PALMER, *Judge.*

Filed March 1st, 1886.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In the District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

B. Kennedy, being first duly sworn, deposes and says that he is an attorney-at-law and a member of the firm of Kennedy Brothers, attorneys for the defendant in the above-entitled action; that he served the attached order extending the time of settling the bill of exceptions in the above-entitled action till March 1st, 1886, by delivering to and leaving with J. W. Taylor, at Canton, Dakota Territory, on the 21st day of January, 1886, — by delivering to and leaving with J. W. Taylor, one of the said attorneys for the plaintiff, at his office, at Canton, Dakota, true copies of the said order and affidavit, and that the said J. W. Taylor informed the deponent that he was the proper attorney for the plaintiff in the above-entitled action on whom to serve the papers on the part of the plaintiff in the above-entitled action.

B. KENNEDY.

Subscribed and sworn to before me by the said B. Kennedy this 22nd day of January, 1886.

J. H. GALE,
Notary Public.

38 TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

C. H. Winsor, being first duly sworn, says he is of the attorneys for the defendant in the above-entitled action; that he has just been furnished with a transcript of the evidence in the case by Messrs. Kennedy Brothers, attorneys, of Canton, with whom the firm of Winsor and Sweezey are associated; that defendant desires further time for the preparation and settlement of the bill of exceptions in the case, as the time of all the attorneys for the defendant is so much occupied with other matters at present.

C. H. WINSOR.

Subscribed and sworn to before me this 18th day of January, 1886.

CHARLES L. BROCKWAY,
Notary Public, D. T.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

In District Court, Fourth Judicial District.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

On reading and filing the affidavit of C. H. Winsor, ordered that the time of settling a bill of exceptions is hereby extended to March 1st, 1886.

Dated January 18th, 1886.

By the court:

C. S. PALMER, *Judge.*

Filed January 18th, 1886.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in District Court in and for said Lincoln County.

ANDREW PETERS }
vs.
J. M. NORTH. }

This case coming on for hearing, at the court-house in the city of Canton, on this first day of March, A. D. 1886, on the defendant's motion to settle the bill of exceptions on this matter, it is ordered that the hearing of this motion and the settling of this bill on the

exceptions be continued till the 28th day of March, 1886, at the court-house in the city of Sioux Falls, Dak., and without further notice to plaintiff.

Dated March 1st, 1886.

By the court:

C. S. PALMER, *Judge.*

Filed March 1st, 1886.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in the District Court in and for the said County.

ANDREW PETERS, Plaintiff,
vs.
J. M. NORTH, Defendant.

Notice of Settling Bill of Exceptions.

To the above-named plaintiff and to J. W. Taylor and Bartlett Tripp, his attorneys:

Take notice that on Monday, the 1st day of March, A. D. 1886, the defendant in the above-entitled action, at the court-house in the city of Canton, Lincoln county, Dakota, will present to the Hon. C. S. Palmer, judge of the said court, and to the said court, then in regular session, the defendant's proposed bill of exceptions in the above-entitled case and ask the said judge and the said court to allow the same and settle the same and make an order making the said proposed bill of exceptions a part of the record in the action; that the said bill will be settled at nine o'clock in the forenoon of the said day or as soon thereafter as counsel can be heard; that the said bill will be settled on all the papers filed in the said action and the records of the court, the minutes of the court, and the stenographer's minutes of the testimony, and the attached proposed bill of exceptions; and you are required to be present if you deem proper, and of which you will take notice.

39

Dated February 22nd, 1886.

KENNEDY BROTHERS,
Attorneys for the Defendant.

Filed April 8th, 1886.

J. W. CARTER,
Clerk Dist. Court,
By H. N. COOPER, *Dep'ty.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in the District Court in and for said County.

ANDREW PETERS, Plaintiff, }
vs. } Proposed Bill of Exceptions.
J. M. NORTH, Defendant. }

And now, this 2nd day of January, A. D. 1884, this cause coming on for hearing before the Hon. A. J. Edgerton, at chambers, at the city of Yankton, in said Territory, on the plaintiff's motion for an injunction, and the motion having been duly argued by the counsel for both parties and the court having considered the same, the court made an order sustaining the said motion of the plaintiff and granting the said injunction as asked by the plaintiff in his motion and application therefor, which application and motion was in writing, and also the order granting the injunction as prayed for in the plaintiff's complaint, and the motion and application therefor were all in writing, and said application and motion for an injunction and the order overruling the same was duly filed with the clerk of this court on the 12th day of Jan., A. D. 1884, to which reference is hereby made, all of said papers being a part of the judgment-roll in this action; to which order and injunction the defendant at the time excepted and now excepts to the said order of injunction.

That this action again came on for trial and hearing at a regular term of the court holden in the city of Canton on the 7th day of February, A. D. 1885, and one question of fact was submitted to a jury by order of the court in the following words, to wit: Whether or not the transaction between the plaintiff in this case and the vendor of the personal property was of such a nature as would make it a fraud upon the creditors of the vendor of the property of Mr. Lund. That is the only question of fact for you to determine here. The only question there is for this jury to pass upon is this—whether there was between the plaintiff and vendor of that property collusion and fraud for the purpose of defrauding creditors of Lund.

Testimony was introduced by both plaintiff and defendant, and at the close of the testimony the defendant asked the court to direct the jury to return a verdict for the defendant for the following reasons, to wit: That there is no evidence that any pretended or unauthorized writs of attachment have been issued or received by the defendant nor any such writs have been or are about to be issued by the defendant.

2nd. That there is no evidence that the defendant has levied excessively on any property or that he is attempting to vex, annoy, or oppress the plaintiff, nor that he has disregarded his duty nor is about to disregard his duty in connection therewith, nor that he has nor is about to enter maliciously into the store of the plaintiff, nor that he has in any manner disregarded his duty as sheriff in connection with the subject-matter of this action, or that

he has acted in any manner collusively with any person to oppress or in any manner wrong the plaintiff.

KENNEDY BROS.,
O. S. GIFFORD AND F. R. AIKENS,
Attorneys for the Defendant.

That at the trial by the jury of the question — fact, as hereinbefore stated, all the allegations of fraud, malice, oppression, and collusion on the part of the defendant were stricken from the plaintiff's complaint on the motion of the plaintiff's attorney, and there was no evidence adduced that the writs issued were pretended and informal, or that any informal or pretended writs were liable to be issued.

That the court overruled the said motion, and the defendant at the time excepted and excepts to the order of the court overruling the said motion.

That the said motion and the ruling of the court thereon was in writing, and was filed on the 7th day of February, 1885, and is attached to the judgment-roll as a part thereof, and reference is hereby made thereto.

DEFENDANT'S COUNSEL: I move to dismiss the complaint and direct a verdict of the jury for the reason that no evidence has been introduced showing collusion or fraud upon the part of the sheriff towards the plaintiff, and that no evidence has been introduced with reference to the question of issue or receipt by him of any pretended or fraudulent writs of attachment.

(The COURT:) The motion is denied.

To which order of the court the defendant at — time excepted.

Plaintiff's counsel asks leave to strike out the portion of his complaint which had any reference to the malice on the part of the officer, which was granted by the court.

Charge of the Court.

This — an action, gentlemen of the jury, brought by Andrew Peters against J. M. North. It was an action originally commenced and addressed to the equity side of this court. The complaint and answer were read in your hearing. Certain matters and allegations were embraced in the complaint and were addressed, as I have said, to the equity side of this court for the purpose of obtaining an injunction to restrain certain proceedings between the parties litigant here. The court acted on those papers, and upon the facts set forth in the affidavits of the plaintiff, which were received for the purpose as I have indicated, the injunction or restraining order was granted, such, as I apprehend, as the plaintiff wanted, and the case comes into court for trial. It is presented here for trial on questions of fact set forth in the complaint and answer, and, as I indicated at the outset to the counsel in this case (and that course has been pursued in the trial), it was limited to the question, viz., whether or not the transaction as between the plaintiff in the case and the vendor of the personal property was of such a nature as would make it a fraud upon

the creditors of the vendor of the property of Mr. Lund. That is the only question of fact for you to determine here. The only question there is for the jury to pass upon is this: whether there was between the plaintiff and the vendor of that property collusion and
41 fraud for the purpose of defrauding the creditors of Lund.

The law of this Territory provides that where there is a transfer of personal property like this in question, and there are creditors of the man who sells the property—debts outstanding against him which have not been paid—that under those circumstances to defeat those creditors and to make that sale or transaction legitimate and legal there must be an actual change in the possession of the property. The defendant comes into this action as a sheriff. He is the sheriff of this county; he is nominally the party here; he represents the creditors that say it was a fraudulent transaction. They say that — through the sheriff as their agent in taking the possession of the property. There has been some evidence introduced here upon the question whether or not there was such a change of possession as would make the transfer legal and of binding effect. The only pertinency this branch of the evidence has is this: The defendant in this case thinks that under the provisions of our law, which provides that to effect the sale of property there must be a transfer, there must be an actual transfer of the property—such a change in the possession as would be observed—an actual change, a *bona fide* change, of possession. In other words, if it were a *bona fide* sale and there were creditors of the vendor in such a transaction the parties purchasing the goods cannot continue in the same business, with the same help, in the same condition and in such a manner as would not be observed by the people, by the public, and by the creditors; that there had been a sale—that there had been a change in the possession of the property. There has been evidence upon this subject introduced on the part of the defendant in this action, Mr. North, under his plea of justification, for the purpose of this trial. I say to you that the issues are such that the sheriff, the defendant in this action, could raise that question and could present it, and it is proper for your consideration in this case whether or not this sale was a *bona fide* sale between Lund and Peters. The creditors charge fraud. The creditors in effect say, and evidence on the part of the defendant tends to show, that this was such a scheme between Peters and Lund that made it a fraudulent transaction—a fraud upon the creditors; hence the law steps in and says that if such is the fact the sale or transaction is inoperative and void. The defendant in this case, Mr. North, representing these creditors and making such a claim as that, I say to you it is incumbent upon the defendant to satisfy you by a preponderance of the evidence that it was fraudulent. They make the claim of fraud. It is incumbent upon him to satisfy you by a preponderance of the evidence that such a transaction was fraudulent or was conducted in a manner that would make it a fraud. In this class of transactions it is often difficult to show positively and conclusively by positive evidence a fraud. Men, if they engage in fraudulent transactions or transactions such as the defendant claims this was, seldom make their pur-

pose known; they seldom advertise that they are going to make a fraudulent transfer. Parties to that kind of a transaction seldom announce their purposes and say we are going to make a trade. We are going to take this man's property and beat his creditors out of it. It is not often that parties are prepared to show by positive evidence that there was a preconceived idea between parties to consummate such a deal for the purpose of defrauding creditors. So evidence has been introduced in this case. Such an issue is presented; circumstances tending to show the character of the transactions—tending to show the purpose of the parties, the intent of the parties in this transaction. It is the
42 evidence which you have in this case and from which you must determine whether or not there was such an intention on the part of Lund and Peters to make a transfer of the property and in that transfer defeat the creditors of Mr. Lund from securing their debts in order to constitute a fraudulent sale. In order to justify you in finding the issues in this case for the defendant it must appear that there was this purpose existing in the minds of these parties to make this transfer for the purpose of hindering and delaying and defeating the creditors of Lund. Lund may have had such a purpose; that may have been his intention and purpose. He may have known the fact that he had six or eight thousand dollars in debts outstanding against him and six or eight thousand dollars worth of property in his hands. He may — gone to work to make this sale with the determination of defeating his creditors from receiving any benefit from his estate or from his property. That fact alone would not be sufficient to satisfy you or warrant you in finding for the defendant in this action unless you find that Peters was a party to that fraud, was a party to that arrangement, or that the circumstances attending that transaction were such as would put Mr. Peters or any man of ordinary intelligence upon his guard. A man standing in the relation or position that Mr. Peters stands in this case cannot close his eyes to the circumstances surrounding a trade of this kind. He cannot stop his ears intentionally for the purpose of not hearing anything or close his eyes to prevent his observing anything that is being done in the operation of defrauding creditors. He cannot do that in the position that he occupies if he is a party to such a transaction, nor can he ignore circumstances in the course of this business that would put a man of ordinary intelligence upon his guard or would cause him or any man of ordinary intelligence or discretion to pause and inquire and consider the question and endeavor to interpret the actions of the party with whom he was dealing. In other words, if Mr. Peters in performing this act saw or had reason to see or was in a position where a man of ordinary intelligence and discretion would discover that there was something wrong being done by the other party with whom he was dealing with reference to his creditors, then it was his duty to stop. If you find from all the evidence that the transactions on the part of Lund were such as would put a man of ordinary intelligence upon inquiry, then Peters had no right to close his eyes and ears and mouth and afterwards complete the transaction, regardless of the

consequences as far as they would affect Lund or his creditors. That is the only question of fact which you must consider. You must take the evidence as it was given. You must by your verdict find whether or not there was this preconceived idea between Mr. Peters and Mr. Lund to defraud the creditors or whether there was such a chain of circumstances attending that transfer and sale as would have caused Mr. Peters or a man of ordinary intelligence to believe that there was something wrong being done by Lund in the transaction. The evidence that has been introduced on the part of the defendant and probably more or less on the part of the plaintiff tends to show that Mr. Taylor operated and acted for the plaintiff, Peters, in this action to a greater or less extent. It is claimed by the defendant in this case that Mr. Taylor was acting as agent of Mr. Peters in this transaction; that while Mr. Peters was the man acting on the surface as the real party that Mr. Taylor was the power behind the throne. He was conducting all these arrangements. He was cognizant of all the facts which the defendant claims in effect to operate as a fraud—a fraud in the direction and to the extent that would render this transaction fraudulent. If you find
43 from all the evidence in this case that Taylor was standing in the position of agent; that the plaintiff in this action was relying in him, was allowing him to do his business for him, and was trusting him with the management and the conduct of his negotiation—in other words, if you find from all the evidence that Taylor was the man that was really negotiating this purchase from Lund, while ostensibly for Peters, or that Taylor was the man who was doing this business and was standing in the relation that made him agent for his father-in-law, Mr. Peters, then he stands in such relation as would make his acts the acts of Peters in this case.

Hence I say to you if you find from all the evidence that Taylor was the agent of Peters, and further find from the evidence that Taylor entered into this transaction and completed it with the avowed purpose of aiding Lund to hinder, delay, and defraud his creditors, then your verdict should be for the defendant.

If you further find that Taylor acted in this relation, and that these transactions were such as would put an ordinary man of prudence and intelligence upon his guard, then it was incumbent upon Taylor as well as Peters to call a halt after they saw anything that led them to believe that this was a transaction for the purpose of aiding Lund to defraud or hinder or delay his creditors.

No damages are claimed in this case. It is simply a question whether or not this was a fraudulent sale on the part of Lund and Peters; whether it was a contract entered into with a view of defrauding these creditors, as I have already indicated to you. In that view of the case your verdict, if you find that to be true, would be simply for the defendant. If you should find that it was a *bona fide* transaction without fraud, with an absence of such a chain of circumstances as would lead Peters and Taylor to apprehend that it was a fraud upon the creditors of Lund, then your verdict should be for the plaintiff.

I have been asked to instruct you that if you find from the evi-

dence that Taylor was acting in the capacity of agent for Peters in the transaction surrounding the transfer from Lund to Peters, and that he had knowledge of Lund's intent to delay, hinder, or defraud his creditors or a knowledge of the fact sufficient to excite the suspicions of a prudent man or to lead a person of ordinary perception to infer fraud, then they have the right to presume that Peters had notice of it all. I also instruct you further that the fraudulent transactions set forth in the defendant's answer must have been in the inception of the transaction—that is, in the sale by Lund to Peters—but subsequent acts calculated to explain the motive which actuated the parties in the beginning and give tone to the original purpose are admissible, and what precedes and follows the transfer, the relations and transactions of the parties, both prior and subsequent, and all of the facts and circumstances surrounding it are proper elements to be considered by the jury. You must take this case, gentlemen, and return such a verdict as in your judgment the evidence will warrant.

That the jury under the said instructions of the court retired to consider their verdict, and on the same day returned into court a verdict in writing in the following words, to wit:

We, the jury in the above-entitled case, find for the plaintiff in all of the issues.

A. P. DIXON, *Foreman.*

That the said verdict is in writing and filed with the judgment-roll in this action as a part thereof, to which reference is hereby made; that on the 13th day of April, A. D. 1885, this
44 cause again came on for hearing on the defendant's motion for a new trial and for judgment notwithstanding the verdict. Both parties, by their attorneys, having duly argued the said motion on either side, the said motion was submitted to the court for decision. The court, having considered the same, overruled the said motion, and his order overruling the said motion was submitted *to* writing, and on January 8th, 1886, was filed and made a part of the judgment-roll in this case, and the defendant's said motion was in writing and was filed March 21st, 1885, and made a part of the judgment-roll; that the defendant at the time excepted to the order of the court overruling the said motion and asked that his exception be allowed by the court, which was done; that reference is hereby made to said motion and orders, all attached to and made a part of the judgment-roll.

That thereupon, on the 8th day of July, A. D. 1885, the court made and entered the following findings of fact and conclusions of law, to wit:

1. That on the 13th day of November, 1883, one P. M. Lund was the owner of the property described in the plaintiff's complaint.

2. On the 13th day of November, A. D. 1883, said Lund sold and conveyed the said property to the plaintiff, and the plaintiff entered into the immediate possession thereof.

3rd. That said sale by Lund to Peters, the plaintiff, was made by

Lund for the purpose of putting the said property and proceeds thereof beyond the reach of his (Lund's) creditors and to defraud said creditors.

4th. That the plaintiff at the time of purchase of said property from said Lund had no knowledge of Lund's purpose in the disposition of the said goods.

5. That the defendant is and at the time of the said sale and transfer of the said property was sheriff of said Lincoln county; that on the 15th and 16th days of November, 1883, he, the said defendant, as sheriff aforesaid, levied upon the said property as the property of the said Lund, the same being then in the possession of the plaintiff under and by virtue of certain warrants of attachment issued out of this court at the suit of various creditors of said Lund, being the same warrants of attachment the enforcement of which against said property is sought to be enjoined in this action.

6. That at the trial by the jury of the questions of fact as hereinbefore stated all the allegations of fraud, malice, oppression, and collusion on the part of the defendant were stricken from the plaintiff's complaint on a motion of the plaintiff's attorney.

7. That no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the sheriff of said property.

Conclusions of Law.

1. That the verdict of the jury heretofore rendered in this cause on the question of fact as herein stated is but an advisory verdict and should be received and accepted only as such by the court in determining the issues in this action.

2. Under the pleadings and proofs herein the plaintiff is entitled to the relief demanded in his complaint; that the preliminary injunction heretofore issued should be made perpetual and final, in accordance with the prayer of plaintiff's petition; that judgment be entered accordingly; that the said findings of fact and conclusions of law were in writing, signed by the court, and filed and made a part of the judgment-roll in this action, to which reference is hereby made.

That the defendant at the time of the said findings being
45 made by the court made the following exceptions: That the defendant excepts to the fourth finding of fact as found by the court. The defendant excepts to the refusal of the court to find the first conclusion of law asked by the defendant. The defendant excepts to the refusal of the court to find the second conclusion of law asked by the defendant. The defendant excepts to the refusal of the court to find the third conclusion of law as asked by the defendant. The defendant excepts to the second conclusion of law as found by the court, and the above exceptions were at the time allowed by the court; that the said exceptions were in writing and signed by the court and filed with said findings of fact and conclusions of law and made a part of the judgment-roll, and reference is hereby made thereto; that the defendant specifically excepts to the fourth findings of fact as found by the court.

That on the 8th day of July, A. D. 1885, the court made a decree in this action in writing and signed the same, ordering and adjudging that the injunction heretofore made in this action be made perpetual and for the costs of the action; which decree was duly filed as a part of the judgment-roll, to which reference is hereby made.

That at the time of the said judgment and decree the defendant made the following exceptions, to wit: That the defendant duly excepts to the judgment of the court, and the exception was allowed by the court and filed with the said judgment; and the defendant excepts to the said judgment and decree for the reason that it was not supported by the findings of fact and conclusions of law.

That after rendering and filing of the said findings of fact and conclusions of law and in due time the defendant moved the court, in writing, for a new trial and to vacate the verdict; which motion was in writing and is attached to the judgment-roll.

That both parties, by their counsel, appeared before the court, and having duly argued the motion on both sides, and the court having held the motion under advisement, and having duly considered the same, now, on the 23rd day of December, A. D. 1885, the court made an order overruling the said motion, and the said order is in writing, attached to the judgment-roll, and filed December 30th, 1885.

That at the time of the making of said order overruling the defendant's motion for a new trial the defendant excepted to such order and asked that his exceptions be allowed, signed, and made of record, which was done.

That the court thereupon made additional findings of fact and conclusions of law against the objections of the defendant.

That the said findings of fact and conclusions of law were made in writing and signed December 21st, 1885, and filed Dec. 22nd, 1885, and made a part of the judgment-roll, and reference is hereby made thereto; that the defendant at the time of making the said additional findings of fact and conclusions of law excepted to each of them and every one of them and specifically excepted to the first, second, third, fourth, and fifth findings of fact and to each of the additional conclusions of law; each of which exceptions were duly allowed.

That the said additional findings of fact and conclusions of law — on the 2nd day of December, A. D. 1885, and filed December 22d, 1885, and made a part of the judgment-roll, and reference is hereby made thereto, and are in the words as follows, to wit: And now, this 2nd day of December, 1885, the defendant's motion for a new trial coming on for hearing, and after due consideration thereof, and upon
46 the motion and application of the plaintiff, the court hereby finds the followings — and conclusions of law in addition to those heretofore found, to wit:

1. That the purchase by plaintiff from P. M. Lund of the goods and chattels mentioned in the complaint includ*ing* the good will of the business thereof carried on by said Lund under the name of P. M. Lund & Co.

2. That the consideration for the said sale and transfer from said

P. M. Lund to the plaintiff was the sum of $10,380, then and there paid by plaintiff to said Lund, and that said consideration was fair and adequate.

3. That at the time of the seizure by the defendant of the goods and chattels mentioned in the complaint and composing the former stock of P. M. Lund & Co. the plaintiff was in the possession thereof as the owner, conducting a profitable business as a retail merchant, and that the acts and threatened acts of the defendant, under and by virtue of the said attachments mentioned and referred to in the pleadings, would, unless restrained by the court, necessarily destroy the plaintiff's said business and deprive him of the profitable profits which might be realized therefrom, and that it would be extremely difficult to ascertain or estimate the pecuniary detriment which the plaintiff would sustain thereby.

4. That the said goods and chattels mentioned in the complaint and plaintiff's said business comprising his entire property and pecuniary resources.

5. That it is admitted by the pleadings and appears as a fact that at the time referred to in the complaint the defendant, as sheriff of Lincoln county, seized the said goods and chattels under and by virtue of sundry warrants of attachment sued out against the property of P. M. Lund; that the defendant as such sheriff then had in his hands many more such attachments against said Lund which he threatened to levy upon the said goods and chattels, and that said numerous other creditors of said Lund were then threatening to sue out and place in the hands of defendant additional warrants of attachment for the purpose of having the same levied upon the said goods and chattels as the property of said Lund.

Conclusions of Law.

1. That it would be extremely difficult to ascertain the amount of compensation which would afford the plaintiff adequate relief from the acts done and threatened to be done by the defendant.

2. That it is necessary to restrain the acts threatened to be done by the defendant to prevent the multiplicity of judicial proceedings.

3. That the plaintiff is entitled to the relief demanded in the complaint.

By the court:

C. S. PALMER, *Judge.*

And now, on the same day, the defendant, by his attorney, C. H. Winsor, duly excepts separately to each of the findings of fact above numbered 1, 2, 3, 4, & 5 and to each of the conclusions of law numbered 1, 2, & 3. Defendant further excepts to the findings of the additional findings of fact and conclusions of law, each of which exceptions are duly allowed.

By the court:

C. S. PALMER, *Judge.*

KENNEDY BROS.,
Attorneys for Def't.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in the District Court in and for said Lincoln Co.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

I, B. Kennedy, being first duly sworn, depose and say that
47 I served the foregoing and attached notice of settling bill of exceptions and the proposed bill of exceptions attached on J. W. Taylor, the attorney for the plaintiff, at his office, in the city of Canton, Lincoln county, Dakota, on Tuesday, the 23rd day of February, A. D. 1886; that I made the said service by delivering to and leaving with the said J. W. Taylor, the attorney for the plaintiff, true copies of the said notice of settling bill of exceptions and the said proposed bill of exceptions.

March 1st, A. D. 1886.

B. KENNEDY.

Subscribed and sworn to before me this first day of March, A. D. 1886.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in the District Court in and for said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

Order Settling Bill of Exceptions.

And now, on this 20th day of March, A. D. 1886, this action coming on for hearing on the defendant's application to settle his proposed bill of exceptions, and it appearing to the court from the orders heretofore made by the court in this action that the time for settling this bill of exceptions had been duly extended and enlarged by the court, and it further appearing that due notice of this application on the part of the defendant had been duly served on J. W. Taylor, the attorney for the plaintiff, and that a copy of the said proposed bill had been duly served on the said J. W. Taylor, as attorney for the plaintiff, and the said J. W. Taylor appearing in person and presented his amendments to the said bill, and the defendant appeared by his counsel, Kennedy Bros., and the court having duly considered the proposed bill of exceptions offered by the defendant and the amendments presented by the plaintiff, the court settled the bill of exceptions according to the truth and the fact, and the attached bill of exceptions the court finds *it* is a true bill of exceptions, and it is ordered that the same is allowed and hereby settled, and it

is further ordered that the same be filed and made a part of the record in this action, and it is hereby made a part of the record in this action, and it is further ordered that the same is a true bill of defendant's exceptions to the rulings of the court in this action.

Done at Sioux Falls, in said district, this 20th day of March, A. D. 1886.

By the court:

C. S. PALMER, *Judge.*

Filed April 8th, 1886.

J. W. CARTER,
Clerk District Court,
By H. N. COOPER, *Deputy.*

TERRITORY OF DAKOTA, }
County of Lincoln. }

Fourth Judicial District, in the District Court in and for the said County.

ANDREW PETERS, Plaintiff, }
vs.
J. M. NORTH, Defendant. }

Judge's Certificate to Judgment-Roll.

I, C. S. Palmer, judge of the fourth judicial district of Dakota, do hereby certify that the following-named papers are contained in and constitute the judgment-roll in the above-entitled case and the whole of the said judgment-roll; that the said papers are hereto attached and named as follows:

1. Summons.
2. Complaint.
3. Undertaking for temporary injunction.
4. Temporary injunction.
5. Amended complaint.

48 6. Motion to increase the penalty of undertaking.

7. Order increasing penalty of injunction undertaking.
8. Answer of the defendant, J. M. North.
9. Affidavit of J. M. North as to direction to levy attachments.
10. Notice of motion for modification of injunction.
11. Temporary injunction.
12. Motion by defendant for instruction to jury.
13. Verdict of the jury.
14. Motion to dismiss the action, and also for a resubmission and new trial.
15. Notice of motion in 14.
16. Motion for new trial and for judgment notwithstanding the verdict.
17. Order overruling motion to dismiss and for a resubmission and for a new trial.
18. Findings of fact and conclusions of law.
19. Decree of perpetual injunction.

20. Exceptions of defendant to findings of fact and decree.
21. Order extending time to prepare and serve bill of exceptions and to present motion for a new trial and to serve the same.
22. Notice of intention to move for a new trial.
23. Motion for a new trial.
24. Additional findings of fact and conclusions of law.
25. Order overruling motion for a new trial.
26. Order extending time to settle bill of exceptions to Febr. 1, 1886.
26½. Order extending time to settle bill of exceptions to March 20th, 1886.
27. Order extending time to settle bill of exceptions to March first, 1886.
28. Order extending time to settle bill of exceptions to March 20th, 1886.
29. Notice of settlement of bill of exceptions.
30. Bill of exceptions and notice of settling and order settling the same.

And I further certify that the above papers constitute the whole of the judgment-roll in the said action, and it is ordered that the said papers and this certificate be duly filed with the clerk of the said court as the judgment-roll in the said action.

Done at my chambers, in the city of Sioux Falls, in said district, this 9th day of July, A. D. 1886.

By the court:

C. S. PALMER, *Judge.*

Filed Aug. 14, A. D. 1886.

J. W. CARTER, *Clerk.*

TERRITORY OF DAKOTA, }
Fourth Judicial District, County of Lincoln. }

In the District Court in and for the County of Lincoln.

ANDREW PETERS, Plaintiff, Respondent, }
vs. } Notice of Appeal from Judgment.
J. M. NORTH, Defendant, Appellant. }

Please take notice that the defendant, appellant, J. M. North, in the above-entitled action appeals from the judgment and decree entered therein on the 8th day of July, A. D. 1885, and filed with the clerk of said court on the 9th day of July, A. D. 1885, and in favor of the plaintiff, Andrew Peters, and against the defendant, J. M. North, for a perpetual injunction, perpetually enjoining the defendant, J. M. North, as sheriff of Lincoln county, Dakota, his deputies, agents, and servants, and his successors in office as sheriff of
49 Lincoln county, from in any manner interfering or meddling with the property of Andrew Peters, described in the complaint, and from seizing or taking possession thereof under — by virtue of any process in or to come into his hands against the property

of P. M. Lund and Co., and for costs taxed and allowed at — dollars, to the supreme court of the territory of Dakota.

Yours, &c., KENNEDY BROTHERS,
Attorneys for Defendant and Appellant, J. M. North.

To Bartlett Tripp and J. W. Taylor, Esqs., attorneys for the plaintiff and respondent, and to J. W. Carter, Esq., clerk of the district court of the county of Lincoln, Dakota.

Service accepted and admitted July 30th, 1886.

J. W. CARTER,
Clerk of the District Court, Lincoln County, D. T.

Personal service of the within notice of appeal and undertaking by delivering to us, at Canton, Dakota, on this day, of a true, full, and perfect copy thereof is hereby admitted.
Dated at Canton, Dakota, this 30th day of July, A. D. 1886.

J. W. TAYLOR,
Attorney for Plaintiff.

Kennedy Brothers, attorneys for defendant and appellant, Canton, Dakota.

Filed July 30th, 1886.

J. W. CARTER,
Clerk District Court.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Fourth Judicial District, in the District Court in and for the said County.

ANDREW PETERS, Plaintiff, }
vs. }
J. M. NORTH, Defendant. }

I, J. W. Carter, clerk of the district court within and for said county of Lincoln, in the fourth judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof; of the judgment-roll and of the certificate of the judge in the above-entitled action, wherein Andrew Peters is plaintiff and J. M. North is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 14th day of August, A. D. 1886.

J. W. CARTER, *Clerk.* [SEAL.]

Fourth Judicial District, in District Court in and for Lincoln County.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

Assignment of Errors.

And the appellant herein says there is manifest error on the face of the record, in this:

1. In allowing a temporary injunction and making a mandatory order requiring the defendant to deliver and turn over to the plaintiff the goods and property levied upon.

2. The court erred in overruling the defendant's motion to direct a verdict for the defendant.

3. The court erred in overruling the first division of defendant's motion to direct a verdict of the jury for the reason that there was no evidence adduced that any pretended, informal, or unauthorized writs of attachment had been issued or were about to be issued. Abstract, page 15.

50 4. The court erred in overruling the second division of defendant's motion to direct a verdict, for the reason that there was no evidence that the defendant had levied excessively upon any property, or that he was attempting to vex or annoy the plaintiff, or that he was acting maliciously or collusively with any person to oppress the plaintiff.

5. The court erred in overruling the defendant's oral motion to direct a verdict and dismiss the complaint, for the reason that no evidence had been introduced showing collusion or fraud on the part of the defendant toward the plaintiff.

6. The court erred in overruling the defendant's motion to dismiss the action.

7. The court erred in overruling the first division of defendant's motion to dismiss the injunction and the complaint, for the reason that there was no evidence adduced that any informal, unauthorized, or pretended writs of attachment had been issued or were about to be issued for the purpose of vexing and annoying the plaintiff.

8. The court erred in overruling the fourth division of defendant's motion to dismiss, for the reason that there was no evidence adduced tending to show that the defendant acted with malice against the plaintiff, or that he conspired with any person or allowed himself to be used for the purpose of oppressing or damaging the plaintiff.

9. The court erred in overruling the fifth division of defendant's said motion, stating that there was no evidence adduced at the trial tending to show that the stock levied upon was of a perishable nature, or that the plaintiff would suffer any irreparable injury by or in consequence of the said goods being levied upon, other than such as a court of law would afford a compensation in damages.

10. The court erred in overruling the sixth division of defendant's

said motion, stating that the defendant's official bond was insufficient, and that there was an entire absence from the record of proper parties defendant in this action, and that the action would not lie against the defendant sheriff.

11. The court erred in overruling the defendant's first motion for a new trial and resubmission and to set aside the injunction.

12. The court erred in overruling the first division of defendant's said motion that there was no evidence tending to prove that the defendant acted with malice toward the plaintiff in levying of attachments referred to in the complaint, and that there was no evidence adduced at the trial tending to prove that the defendant conspired with any person or party to oppress or injure the plaintiff.

13. The court erred in overruling the third division of defendant's said motion that there was no evidence at the trial tending to prove that the plaintiff would suffer any irreparable injury from the attachment of the stock in question.

14. The court erred in overruling the sixth division of defendant's said motion that there was no evidence adduced at the trial tending to show that the warrants of attachment under which the defendant acted were either pretended or void. Transcript, page 39.

15. The court erred in finding the fourth finding of fact, for the reason that there was no evidence adduced to sustain the same.

16. The court erred in making and ordering the second conclusion of law, as it was contrary to the facts found.

17. The court erred in ordering that judgment be entered
51 for the plaintiff, as prayed in the complaint, and the said decree and judgment is contrary to law.

18. The court erred in not finding on all the issues made by the pleadings.

19. The court erred in not finding whether or not the warrants of attachment under which the defendant levied on the stock in question were pretended, informal, and unauthorized, and whether or not Wm. M. Cuppett threatened to issue a large number of such writs for the purpose of vexing and annoying the plaintiff.

20. The court erred in not finding whether or not the defendant excessively levied and pretended to serve any pretended writs, directed to him to be served upon and against the property of P. M. Lund & Co., upon and against the plaintiff's said property without authority of law, and whether or not it was done with the intent to vex and annoy the plaintiff and to oppress him.

21. The court erred in not finding whether or not the defendant had fallen into a conspiracy with divers persons and was allowing himself to be used as an instrument to oppress and damage the plaintiff.

22. The court erred in failing to find and not finding whether or not the property in question consisted of a fall and winter stock of general merchandise and other property of a perishable nature, and what irreparable injury and damage, if any, the plaintiff would suffer if the defendant was not restrained from holding or interfering with the goods.

23. The court erred in omitting to find whether or not the plaintiff had a plain, speedy, and adequate remedy at law.

24. The court erred in failing to find whether or not the plaintiff owned the good will in trade of P. M. Lund & Co., and whether the plaintiff was enjoying a good trade and business, and whether the acts of the defendant were intended to maliciously destroy the same and ruin the plaintiff, and whether or not the plaintiff had any other available property, and whether or not he enjoyed a good name and credit, and whether or not defendant was about to destroy the same, and whether or not the defendant's acts, if allowed and permitted, would cause irreparable mischief and damage, to the ruin of the plaintiff.

25. The court erred in failing to find that whether or not the facts stated in the eighth division of defendant's complaint were true as to whether or not the insurance on the stock was liable to be canceled, and whether or not irreparable damage was likely to result.

26. The court erred in rendering a judgment and decree of perpetual injunction for the plaintiff, it being contrary to the facts found and contrary to law; and the pleadings and facts found clearly show that the defendant was not a proper party defendant, and that the plaintiff had a full, speedy, and adequate remedy at law.

27. The court erred in failing to find that the plaintiff had a plain, speedy, and adequate remedy at law.

28. The court erred in overruling the defendant's motion for a new trial, made after the findings of fact and conclusions of law were recorded.

29. The court erred in omitting to find whether said action would prevent a multiplicity of suits.

30. In omitting whether the plaintiff could get adequate relief and pecuniary compensation.

31. In omitting to find whether or not it would be extremely difficult to ascertain the amount of consideration which would afford adequate relief in the action.

32. In refusing to find that the plaintiff was not an innocent
52 purchaser from Lund and in good faith.

33. That the findings of fact do not support the conclusions of law or of judgment in this action, and the judgment is erroneous.

34. The court erred in making and finding additional findings of fact and conclusions of law were made, signed, filed, and entered of record, and judgment had been entered, which additional findings of fact and conclusions of law were made on the 2nd day of December, 1885.

35. The court erred in making the first additional finding of fact, it being in conflict with the facts already found, and that there was no evidence to support it.

36. The court erred in finding the third additional finding of fact, it being in conflict with the facts already found and there being no evidence to support it.

37. The court erred in making the first additional conclusion of law, there being no finding of fact to support it.

38. The court erred in finding the second conclusion of law, there being no finding of fact to support it and in conflict with the issues made by the pleadings.

39. The judgment and decree is not supported by the findings of facts and the facts found show that the defendant was a sheriff acting in the line of his duty without any malice, collusion, or fraud, and that he is not a proper or necessary party to this action, and the court — in rendering judgment and decree against him in the absence of the proper parties, the creditors, plaintiffs in the warrants of attachment and attachment proceedings, and the court had no jurisdiction. The facts found show that the plaintiff had a plain, speedy, and adequate remedy at law.

KENNEDY BROS.,
Attorneys for Appellant, J. M. North.

[Endorsed:] Territory of Dakota, supreme court. Andrew Peters, respondent, *vs.* J. M. North, appellant. Transcript. This transcript and all the papers therein filed this 23rd day of August, A. D. 1886. James A. Haight, clerk.

THE UNITED STATES OF AMERICA, *Territory of Dakota,* } *ss:*

In the Supreme Court.

ANDREW PETERS, Plaintiff and Respondent, *vs.* J. M. NORTH, Defendant and Appellant. } October Term, A. D. 1886.

Appeal from the district court of Lincoln county.

This action coming on to be heard at the October, A. D. 1886, term of this court, at the supreme court room, in the city of Deadwood, D. T.—present, Bartlett Tripp, chief justice, and Cornelius S. Palmer, William H. Francis, William B. McConnell, Louis K. Church, and Charles M. Thomas, associate justices—and the appeal herein having been argued by C. B. Kennedy and C. H. Winsor, Esqrs., for the appellant, and by J. W. Taylor, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lincoln county appealed from herein be, and the same is hereby, in all things affirmed; and it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment
53 of this court; and it is further considered and adjudged that the respondent have and recover of the appellant costs and disbursements on this appeal expended, taxed and allowed at —.

By the court:

BARTLETT TRIPP,
Chief Justice of Supreme Court, D. T.

For affirmance: Justices Palmer, McConnell, and Thomas.
For reversal: Justices Francis and Church.
Tripp, Ch. J., having been of counsel, did not sit.

(Indorsed:) In supreme court, Territory of Dakota. October term, 1886. Andrew Peters, plaintiff and respondent, *vs.* J. M. North, defendant and appellant. Filed in open court this 9th day of October, 1886. James A. Haight, clerk.

CHICAGO, *Oct.* 12, 1886.

DEAR SIR: I wish you would hold remittitur in case of Peters *vs.* North for, say, 15 or 20 days. Mr. Kennedy desires me to request a rehearing. As soon as I get back I want — communicate with Judge Palmer in reference to the matter.

Yours truly, WM. B. McCONNELL,
Asso. Justice.

J. A. Haight, clerk sup. court, Bismarck.

(Indorsed:) Territory of Dakota, supreme court. Peters *vs.* North. Request of Judge McConnell to hold remittitur. Filed this 28th day of October, A. D. 1886. James A. Haight, clerk.

TERRITORY OF DAKOTA, }
County of ——, } *ss:*

Supreme Court, — Judicial District.

ANDREW PETERS, Respondent, }
vs.
J. M. NORTH, Appellant. }

Costs and disbursements:

Statute costs before argument, $5; argument, $15	$20 00
Clerk's fees to be taxed	
To expense printing respondent's brief	29 00

The above bill of costs and disbursements taxed and allowed at $—.
Dated —— —, 188–.

—— ——, *Clerk.*

TERRITORY OF DAKOTA, }
County of Lincoln, } *ss:*

J. W. Taylor came personally before me, and, having been first duly sworn, deposes and says that he is the attorney of said appel'nt in the above-entitled action; that the above bill and items of cost and disbursements therein are just and correct, and have been or will be necessarily incurred in said action.

J. W. TAYLOR.

Subscribed and sworn to before me this 18th day of October, 1886.

O. K. BROWN,
Notary Public. [SEAL.]

Please take notice that on the 28th day of October, A. D. 1886, at 1 o'clock p. m., application will be made to Jas. M. Haight, Esq., clerk of said court, at his office, in the city of Bismarck, in the county of Burleigh and Territory of Dakota, to have the foregoing bill of costs and disbursements taxed and inserted in the judgment then and there to be entered herein.

Dated Canton, D. T., Oct. 18th, 1886.

Yours respectfully,

J. W. TAYLOR,
Attorney for Respondent.

To Kennedy Bros., appellant's attorneys.

(Indorsed:) Supreme court. A. Peters *vs.* J. M. North. Affidavit of disbursements on trial. Filed this 28th day of October, A. D. 1886. James A. Haight, clerk. J. W. Taylor, respondent's and plaintiff's attorney.

54 Service of the within notice by copy admitted this 18th day of October, 1886.

KENNEDY BROS.,
Attorneys for Appellant.

TERRITORY OF DAKOTA:

In Supreme Court. October Term, 1886.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

I, James A. Haight, clerk of said court, do hereby certify that I have upon the records and files of this office, and pursuant to the notice of taxation of costs herein, taxed the costs as follows:

Attorney's fee for argument	$15 00
Attorney's fee before argument	5 00
Printing briefs	29 50
Clerk's fees	10 60
Total	$60 10

Witness my hand and the seal of this court this 28th day of October, A. D. 1886.

JAMES A. HAIGHT, *Clerk.*

(Indorsed:) Territory of Dakota supreme court. Andrew Peters, res., *v.* J. M. North, app. Res. tax- costs, $60.10. Filed this 28th day of October, A. D. 1886. James A. Haight, clerk.

FARGO, DAKOTA, *Nov. 17th*, 1886.

DEAR SIR: In case of Peters *vs.* North, decided at Deadwood, as

one of the concurring justices I desire to ask for a rehearing of the case unless the remittitur has been sent down and it is too late.

Yours truly, WM. B. McCONNEL.

J. A. Haight, Esq., Bismarck.

(Indorsed:) Peters *v.* North. Request for rehearing. Filed this 21st day of November, A. D. 1886. James A. Haight, clerk.

Petition for Rehearing.

In the Supreme Court of the Territory of Dakota. October Term, 1886.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

Your petitioner respectfully represents to the court that the above-entitled action is one involving a large amount of money, to wit, ten thousand dollars; that said action also involves questions of law and practice presented for the first time to the supreme court of this Territory; that said matters were argued at the present term of said court at Deadwood; that only an hour and a quarter was allowed the parties on either side to present the questions involved to said court; that the time was so limited that said matters could be but partially argued and could not fairly be presented in such a limited time to the court; that the court was divided upon the questions involved, three of the judges being for affirmance and two for reversal; that the questions are of great interest to the bar of this Territory and of great and necessary value, because, as your petitioner represents, if this judgment is affirmed it will overturn the
55 present practice in regard to attachments and claims sued upon by creditors.

And your petitioner further states that he is informed by the clerk of the supreme court that the remittitur in this action has been returned to the clerk of the court of Lincoln county. Your petitioner therefore asks that the remittitur from said court to the district court of Lincoln county may be recalled, and that a rehearing be ordered in this action.

KENNEDY BROS. &
C. H. WINSOR,
Att'ys for Appellant.

In the Supreme Court of the Territory of Dakota. October Term, 1886.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

Please take notice that the appellant will at the place of holding the supreme court, at the city of Bismarck, the capital of said Terri-

tory *of said Territory*, at ten o'clock in the forenoon of Monday before the first Tuesday in February, 1887, said day being the last day of the October term of said court, move the said court for a rehearing in the above-entitled action.

KENNEDY BROS. &
C. H. WINSOR,
Att'ys for Appellant.

To J. W. Taylor, Esq., att'y for respondent.

(Indorsed:) In the supreme court of the Territory of Dakota. Andrew Peters against J. M. North. Filed this 18th day of December, A. D. 1886. James A. Haight, clerk. Petition and notice.

Personal service of the within petition and notice by delivery to me, at Canton, D. T., on this day, of a true, full, and perfect copy thereof is hereby admitted.

Dated at Canton, D. T., this 1st day of Dec., A. D. 1886.

J. W. TAYLOR,
Attorney for Respondent.

Kenedy Bros. & C. H. Winsor, attorneys for def't, Sioux Falls, D. T.

In the Supreme Court of Dakota Territory. Feb'y Term, 1887.

ANDREW PETERS, Respondent,
ag'l
JULIUS M. NORTH, Appellant.

On the application in open court of the appellant above named an appeal to the Supreme Court of the United States is allowed in this action, and it is further ordered that the appellant file a bond on such appeal in the sum of $1,000, and that upon the filing of such bond with the clerk of this court that the citation be issued, and that appellant have sixty days from the date of filing this order to file such bond.

By the court:

BARTLETT TRIPP,
Chief Justice.

(Indorsed:) Peters, res., *vs.* North, ap'l. Order allowing appeal. Filed this 11th day of February, A. D. 1887. James A. Haight, clerk.

56 ANDREW PETERS, Plaintiff and Respondent,
vs.
J. M. NORTH, Defendant and Appellant.

To the supreme court of Dakota Territory:

Whereas, on the ninth day of October, A. D. 1886, the above-named respondent recovered a judgment in this court against the appellant affirming a judgment in the district court of the fourth judicial district of Dakota Territory in and for the county of Lincoln, decreeing a perpetual injunction against the appellant; and whereas the

said supreme court of Dakota Territory did, on the 11th day of February, 1887, allow an appeal to the Supreme Court of the United States and order that the appellant furnish a bond on said appeal, within sixty days from said February 11th, in the sum of one thousand dollars:

Now, therefore, we do hereby undertake that the said Julius M. North, appellant, will pay all costs and damages that may be awarded against him on said appeal; or, in case there should be a dismissal thereof, not exceeding the sum of one thousand dollars.

JULIUS M. NORTH,
JOHN V. FARWELL,
OLIVER C. WYMAN,
LON. E. WILSON, AND
D. W. THOMPSON.

STATE OF ILLINOIS, } ss:
County of Cook, }

John V. Farwell, being severally sworn, each for himself says he is a resident and freeholder of the county of Cook and State of Ill., and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

JOHN V. FARWELL.

Subscribed and sworn to before me this 19 day of March, 1887.

JAMES B. GASCOINE, [SEAL.]
Notary Public.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Oliver C. Wyman, being severally sworn, each for himself says he is a resident and freeholder of the county of Hennepin & State of Minnesota, and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

OLIVER C. WYMAN.

Subscribed and sworn to before me this 21st day of March, 1887.
[NOTARIAL SEAL.] —— ——.

TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Lon. C. Wilson and D. W. Thompson, being severally sworn, each for himself says that he is a resident and freeholder of the county of Lincoln and Territory of Dakota, and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

LON. E. WILSON.
D. W. THOMPSON.

Subscribed and sworn to before me this 24th day of March, A. D. 1887.

C. B. KENNEDY, [SEAL.]
Notary Public.

(Indorsed:) In the supreme court, Territory of Dakota. Andrew Peters, respondent and plaintiff, against J. M. North, defendant and appellant. Filed March 30, 1887. James A. Haight, clerk, by Isaac Ross, deputy.

57 In the Supreme Court of the Territory of Dakota. October Term, 1886.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

(*Minutes Entered on the Journal of the Supreme Court.*)

October 5th. Counsel answers for argument.

October 7th. The argument is begun; C. B. Kennedy, Esq., and C. H. Winsor, Esq., arguing for the appellant and J. W. Taylor, Esq., arguing for respondent; Tripp, chief justice, having been of counsel, not sitting in the case.

The argument is resumed; J. W. Taylor, Esq., continuing for the respondent and C. B. Kennedy, Esq., closing for appellant.

October 9th. The court hands down its judgment, affirming the judgment of the district court; Francis and Church, JJ., dissenting and Tripp, C. J., not sitting.

A motion being presented to the court by C. B. Kennedy, Esq., on behalf of appellant, for a stay of remittitur for the sake of a rehearing, the court orders that the motion be, and the same is hereby, denied.

1887.

January 31st. A motion to recall the remittitur was presented to the court by C. H. Winsor, Esq., on behalf of the appellant.

February 5th. The court orders that the motion for a reargument of this cause be, and the same is hereby, denied.

February 11th. The court hands down and files with the clerk its order allowing an appeal to the United States Supreme Court.

58 TERRITORY OF DAKOTA, *ss:*

In Supreme Court.

ANDREW PETERS, Respondent,
versus
J. M. NORTH, Appellant.

I, James H. C. Young, clerk of said court, do hereby certify that the within and foregoing is a full, true, correct, and complete transcript and copy of the record and files of my office in the above-entitled action.

Seal Supreme Court of Dakota Territory.

Witness my hand and the seal of this court this 16 day of May, A. D. 1887.

J. H. C. YOUNG, *Clerk.*

59 TERRITORY OF DAKOTA, *ss:*

In the Supreme Court.

ANDREW PETERS, Respondent,
vs.
J. M. NORTH, Appellant.

I, J. H. C. Young, clerk of the said court, do hereby certify that on the 29th day of November, 1886, the remittitur in the above-entitled cause was duly sent down and transmitted to the clerk of the district court of the county of Lincoln and Territory of Dakota, since which date the same has not been returned to or filed in this court, as appears from the records and files of my office.

[Seal Supreme Court of Dakota Territory.]

J. H. C. YOUNG,
Clerk Supreme Court, Dakota Ter.

Yankton, D. T., January 28, 1889.

60 In the Supreme Court of the United States.

ANDREW PETERS, Appellee,
vs.
J. M. NORTH, Appellant.

It is hereby stipulated and agreed by the above-named parties, by their counsel in said cause, that the attached certificate of the clerk of the supreme court of the Territory of Dakota in the above-entitled case may be filed and used as a part of the duly certified record of said case now pending upon appeal in the Supreme Court of the United States.

C. H. WINSOR,
Counsel for Appellant.
J. W. TAYLOR,
Counsel for Appellee.
JOHN W. CARY,
Counsel for Appellant.

61 [Endorsed:] Supreme Court U. S. 1888, Oct'r term. No. 755. J. M. North, app't, *vs.* Andrew Peters. Stipulation of counsel and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Apr. 22, 1889. James H. McKenney, clerk.

62 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

C. H. Winsor, being duly sworn, says he is one of the attorneys for the appellant in an appeal now taken to the Supreme Court of the United States from the supreme court of the Territory of Dakota, in which Andrew Peters is the respondent and J. M. North is the appellant; that the value of the matter in dispute in said action, exclusive of costs, exceeds the sum of five thousand dollars ($5,000).

C. H. WINSOR.

Subscribed and sworn to before me this 27th day of August, A. D. 1887.

[Seal E. W. Harvey, Notary Public, Dakota.]

E. W. HARVEY,
Notary Public, D. T.

63 And the appellant assigns for error in the Supreme Court of the United States and relies upon the same the following assignment:

I. The supreme court of the Territory erred in affirming the ruling of the district court in allowing a temporary injunction and making a mandatory order requiring the defendant to deliver and turn over to the plaintiff the goods and property levied upon.

II. The supreme court erred in affirming the ruling of the district court of Lincoln county, D. T., in overruling the defendant's motion to direct a verdict for the defendant.

III. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the first division of defendant's motion to direct a verdict of the jury for the defendant for the reason that there was no evidence adduced that any pretended, informal, or unauthorized writs of attachment had been issued or were about to be issued.

IV. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the second division of defendant's motion to direct a verdict for the defendant for the reason that there was no evidence that the defendant had levied excessively upon any property, or that he was attempting to vex or annoy the plaintiff, or that he was acting maliciously or collusively with any person to oppress the plaintiff.

V. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the defendant's oral
64 motion to direct a verdict and dismiss the complaint for the reason that no evidence had been introduced showing collusion or fraud on the part of the defendant toward the plaintiff.

VI. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the defendant's motion to dismiss the action.

VII. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the first division of defendant's motion to dismiss the injunction and the complaint for the reason that there was no evidence adduced that any informal, unauthorized, or pretented writs of attachment had been issued or were about to be issued for the purpose of vexing and annoying the plaintiff.

VIII. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the fourth division of defendant's motion to dismiss for the reason that there was no evidence adduced tending to show that the defendant acted with malice against the plaintiff, or that he conspired with any person or allowed himself to be used for the purpose of oppressing or damaging the plaintiff.

IX. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the fifth division of defendant's said motion, stating that there was no evidence adduced at the trial tending to show that the stock levied upon was of a perishable nature, or that the plaintiff would suffer any irreparable injury by or in consequence of the said goods being levied upon other than such as a court of law would afford a compensation in damages.

65 X. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the sixth division of defendant's said motion, stating the defendant's official bond was insufficient, and that there was an entire absence from the record of proper parties defendant in this action, and that the action would not lie against the defendant sheriff.

XI. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the defendant's first motion for a new trial and resubmission and to set aside the injunction.

XII. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the first division of defendant's said motion that there was no evidence tending to prove that the defendant acted with malice toward the plaintiff in levying of attachments referred to in the complaint, and that there was no evidence adduced at the trial tending to prove that the defendant conspired with any person or party to oppress or injure the plaintiff.

XIII. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the third division of defendant's said motion that there was no evidence at the trial tending to prove that the plaintiff would suffer any irreparable injury from the attachment of the stock in question.

XIV. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the sixth division of defendant's said motion that there was no evidence adduced at the

trial tending to show that the warrants of attachment under
66 which the defendant acted were either pretended or void.

XV. The supreme court of the Territory erred in affirming the ruling of the district court in finding the fourth finding of fact for the reason that there was no evidence adduced to sustain the same.

XVI. The supreme court of the Territory erred in affirming the ruling of the district court in making and ordering the second conclusion of law, as it was contrary to the facts found.

XVII. The supreme court of the Territory erred in affirming the ruling of the district court in ordering that judgment be entered for the plaintiff, as prayed in the complaint.

XVIII. The supreme court of the Territory erred in affirming the ruling of the district court in rendering a judgment and decree of perpetual injunction for the plaintiff.

XIX. The supreme court of the Territory erred in not reversing the judgment of the district court for failure to find on all the issues in the pleadings.

XX. The supreme court of the Territory erred in not reversing the judgment of the district court for failure to find whether or not the plaintiff had a plain, speedy, and adequate remedy at law.

XXI. The supreme court of the Territory erred in affirming the ruling of the district court in overruling the defendant's motion for a new trial made after the findings of fact and conclusions of law were recorded.

XXII. The supreme court of the Territory erred in failing
67 to reverse the judgment of the district court for omitting to find whether said action would prevent a multiplicity of suits.

XXIII. The supreme court of the Territory erred in not reversing said action for the reason that the district court failed to find whether or not the plaintiff could get adequate relief and pecuniary compensation.

XXIV. The supreme court of the Territory erred in not reversing the — district court for failure to find whether or not it would be extremely difficult to ascertain the amount of consideration which would afford adequate relief in an action at law by the plaintiff against the defendant.

XXV. The supreme court of the Territory erred for affirming the ruling of the district court in refusing to find that the plaintiff was not an innocent purchaser from Lund in good faith.

XXVI. The supreme court of the Territory erred in refusing to reverse the judgment of the district court for the reason that the findings of fact of the district court do not disturb the conclusions of law.

XXVII. The supreme court of the Territory erred in refusing to reverse the judgment of the district court for making and finding additional findings of fact and conclusions of law after judgment had been entered for several months.

XXVIII. The supreme court of the Territory erred in refusing to reverse the judgment for the reason that the first additional find-

ing of fact was in conflict with the facts already found and there was no evidence to support it.

XXIX. The supreme court of the Territory erred in re-
68 fusing to reverse the judgment for the reason that the third additional finding of fact was in conflict with the facts already found and there was no evidence to support it.

XXX. The supreme court of the Territory erred in refusing to reverse the judgment of the district court for making the first and second additional conclusions of law, there being no findings of fact to support them or either of them, they being in conflict with the issues made by the pleadings.

XXXI. The supreme court of the Territory erred in not reversing the judgment of the district court for the reason that said judgment was not supported by the findings of fact, and the facts found show that the defendant (appellant) was a sheriff acting in the line of his duty without any malice, collusion, or fraud, and that he is not a proper or necessary party to this action, and the court, in rendering judgment and decree against him in the absence of the proper partise, namely, the creditors, plaintiffs in the warrants of attachment and attachment proceedings, had no jurisdiction, and the facts show that the plaintiff had a plain, speedy, and adequate remedy at law.

XXXII. The supreme court of the Territory erred in affirming the judgment of the district court.

69 Copy.

In the Supreme Court of Dakota Territory.

ANDREW PETERS, Plaintiff and Respondent,
vs.
JULIUS M. NORTH, Defendant and Appellant.

Whereas, on the ninth day of October, A. D. 1886, the above-named respondent recovered a judgment in this court against the appellant affirming a judgment in the district court of the fourth judicial district of Dakota Territory in and for the county of Lincoln, decreeing a perpetual injunction against the appellant; and whereas the said supreme court of Dakota Territory did, on the 11th day of February, 1887, allow an appeal to the Supreme Court of the United States and order that the appellant furnish a bond on said appeal within sixty days from said February 11th in the sum of one thousand dollars:

Now, therefore, we do hereby undertake that the said Julius M. North, appellant, will pay all costs and damages that may be awarded against him on said appeal or in case there should be a dismissal thereof, not exceeding the sum of one thousand dollars.

JULIUS M. NORTH.
JOHN V. FARWELL.
OLIVER C. WYMAN.
LON E. WILSON.
D. W. THONPSON.

70 STATE OF ILLINOIS, } ss:
County of Cook, }

John V. Farwell, being severally sworn, each for himself says that he is a resident and freeholder of the county of Cook and State of Ill., and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

JOHN V. FARWELL.

Subscribed and sworn to before me this 19th day of March, 1887.
[NOTARIAL SEAL.] JAMES B. GASCOINE,
Notary Public.

71 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Oliver C. Wyman, being severally sworn, each for himself says that he is a resident and freeholder of the county of Hennepin and State of Minnesota, and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

OLIVER C. WYMAN.

Subscribed and sworn to before me this 21st day of March, 1887.
[NOTARIAL SEAL.] ——— ———.

72 TERRITORY OF DAKOTA, } ss:
County of Lincoln, }

Lon. E. Wilson and D. W. Thonpson, being severally sworn, each for himself says that he is a resident and freeholder of the county of Lincoln and Territory of Dakota, and that he is worth the sum of two thousand dollars over his debts and liabilities, exclusive of all property exempt from levy and sale on execution.

LON. E. WILSON.
D. W. THONPSON.

Subscribed and sworn to before me this 24th day of March, A. D. 1887.
[NOTARIAL SEAL.] C. B. KENNEDY,
Notary Public.

72½ [Endorsed:] In the supreme court, Territory of Dakota. Andrew Peters, respondent, plaintiff, against J. M. North, defendant, appellant. Filed March 30, 1887. James A. Haight, clerk, by Isaac Ross, deputy. C. B. Kennedy and C. H. Winsor, attorneys.

73 Supreme Court, Territory of Dakota.

I, J. H. C. Young, clerk of the supreme court of the Territory of Dakota, do hereby certify the foregoing to be a full, true, and complete copy of the appeal bond in the case of Andrew Peters, plaintiff

and respondent, *vs.* Julius M. North, defendant and appellant, as the same now remains on file in my office.

Witness my hand and seal, at Yankton, D. T., this 20th day of October, A. D. 1887.

[Seal Supreme Court of Dakota Territory.]

J. H. C. YOUNG,
Clerk Supreme Court of the Territory of Dakota.

[Endorsed:] Sup. court U. S. 1887, Oct'r term. No. 1116. J. M. North, app't, *vs.* Andrew Peters. Certified copy of appeal bond.
[Stamped:] Office Supreme Court U. S. Filed Oct. 28, 1887. James H. McKenney, clerk.

74 THE UNITED STATES OF AMERICA, }
Territory of Dakota. }

In the Supreme Court.

To Andrew Peters and his attorney, J. W. Taylor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the supreme court of the Territory of Dakota at the February term, 1887, the petition for which and allowance of -as filed in the clerk's office of the supreme court of the Territory of Dakota, wherein J. M. North is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant, as in said petition for appeal and order allowing said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

75 Witness the Honorable Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota, this 20th day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal Supreme Court of Dakota Territory.]

J. H. C. YOUNG,
Clerk of the Supreme Court of Dakota Territory.

[Written on margin:] 289. 1116.
[Stamped:] Office Supreme Court U. S. Filed Oct. 21, 1887. James H. McKenney, clerk.

TERRITORY OF DAKOTA, }
County of Lincoln, } *ss:*

I, Burrel B. Wright, sheriff of Lincoln county, Dakota, do hereby certify that the within citation was placed in my hands for service on the 3d day of June, A. D. 1887, and on the same day, at the city of Canton, Lincoln county, Dakota, I served the same personally on the plaintiff, respondent, Andrew Peters, by delivering to and leaving with J. W. Taylor, his att'y of record, a true copy thereof; and

I also, at the same time and place, served the within citation on J. W. Taylor, well known to me to be the same party therein named, by delivering to and leaving with him a true copy thereof.

B. B. WRIGHT,
Sheriff of Lincoln Co., D. T.

Service	60
Copy	25
Mileage	10
	95

76 [Endorsed:] Supreme Court U. S. 1887, October term. No. 1116. J. M. North, app't, *vs.* Andrew Peters. Citation. [Stamped:] Office Supreme Court U. S. Filed Oct. 21, 1887. James H. McKenney, clerk.

Endorsed on cover: Dakota Ter'ty supreme court. No. 148. J. M. North, appellant, *vs.* Andrew Peters. Filed October 6, 1887.

No. 148. October Term, 1890.

IN THE SUPREME COURT

OF THE

UNITED STATES.

J. M. NORTH, Appellant,

vs.

ANDREW PETERS, Appellee.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

FRED B. DODGE, Counsel for Appellant.

No. 148. OCTOBER TERM, 1890.

IN THE SUPREME COURT

OF THE

UNITED STATES.

J. M. NORTH, APPELLANT,

vs.

ANDREW PETERS, APPELEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

STATEMENT OF CASE.

This suit was brought by Andrew Peters in the District Court of the 4th Judicial District of the Territory of Dakota, in November, 1883, to obtain an injunction, mandatory in its character, requiring the surrender to him of a stock of general merchandise, which J. M. North, as sheriff of Lincoln County, Dakota, had seized and levied upon as the property of P. M. Lund & Co., under and pursuant to certain warrants of attachment sued out of said court against the property of said Lund & Co.

The court was asked to exercise its equity jurisdiction and grant an extraordinary remedy upon the following grounds stated in the amended complaint:

1. That plaintiff was, and since November 13th, 1883, had been the owner of a stock of merchandise of the value of $10,000.00, being and situated in the store lately occupied by P. M. Lund & Co., in Canton, D. T. (Rec. 9.)

2. That on November 15, 1883, one Cuppet, Clerk of said Court, issued pretended and informal Writs of Attachment against the property of P. M. Lund & Co., and was about to issue many more such writs for the purpose of vexing and annoying plaintiff. (Rec. 9.)

3. That J. M. North, the Sheriff of said County (the sole defendant in the action), had maliciously and excessively levied said writs, and

threatened to levy many more, and had fallen into a conspiracy with divers persons to vex, annoy, oppress and defraud the plaintiff. (Rec.9).

4. That the property seized was purchased for the current season, and is of a perishable nature; that he had to borrow some money in order to make the purchase, and that he depends on his sales to repay the same. That he is an old man, has a family partly dependent on, him for support, and that unless the Sheriff be restrained, irreparable injury and damage will result to him. (Rec. 9 & 10).

5. That he fears that he will not be able togive the bonds required to retake said property; that the Sheriff's official bond is inadequate to afford him protection, and that if he be not allowed to pursue his business peaceably, the injury cannot be amply compensated in damages (Rec. 10).

6. That the goods are in a wooden building, and that unless he has possession thereof the insurance companies will decline to carry insurance thereon. (Rec. 11).

The defendant by his answer traversed all these averments except the averment that he had levied upon the property described. In regard thereto he alleged: That he had received certain specified Writs of Attachment directed to him as Sheriff of Lincoln County, wherein he was required to attach and safely keep the property of Lund & Co. and that he had under and by virtue of these writs levied upon said property as the property of Lund & Co., and further, that it was in fact the property of Lund & Co., and had been transferred to the plaintiff (Peters) by a pretended and fraudulent sale, made for the purpose of putting it beyond the reach of creditors named as plaintiffs in said warrants of attachment. (Record, 14, 15, 16 & 17).

Upon the complaint and affidavits a temporary injunction was granted over the objection of the defendant in the action. (Rec. 21, Orig. 19, 20).

The cause came on for trial at a regular term of the Court held at Canton in February, 1885, and one question of fact, viz: whether the sale and transfer from Lund & Co. to Peters was as to the creditors of Lund & Co. fraudulent, was by order of the Court submitted to a jury. The jury found for the plaintiff. (Rec. 52, Orig. 43, also Rec. 23, Orig. 21).

At the trial the plaintiff struck from his complaint all averments respecting the animus of the defendant, so that at the close of the testimony, all claim of fraud, coercion, collusion oppression &c. had been eliminated from the case. (Rec. 36, Orig. 32, 6th finding of fact, also Rec. 48, Orig. 40).

The defendant in the action upon the theory that these averments were jurisdictional, and that the court was without power to enter, as against him, a decree without it appeared he had been guilty of misconduct as alleged, asked at the close of the testimony a dismissal of the complaint and action. This motion the Court denied. (Rec. 48 Orig. 40, also Rec. 23, 24, Orig. 21).

The verdict of the jury was treated as advisory merely, and the court having thereby enlightened its conscience, found as a matter of fact, that that the sale on Lund's part was fraudulent, but that Peters "had no knowledge of his purpose:" and further found that "no evidence was adduced that the plaintiff (Peters) would suffer any irreparable injury in consequence of the seizure by the sheriff of said property."

The court, nevertheless, directed that the injunction be made perpetual. (Rec. 35-6-7, Orig. 31-2, also Rec. 53, Orig. 44.)

This was accordingly done by judgment regularly entered. (Rec. 37-8, Orig. 32-3.)

A motion for a new trial was duly made, and same was after argument denied.

Thereupon—nearly six months after rendition of its judgment—upon application of the plaintiff, the court made addittonal findings of fact and conclusions of law. The court found among other things that the purchase by Peters included the good will of the business of Lund & Co., also that at the time of the seizure he (Peters) "was conducting a profitable business as a retail merchant," and concluded as matter of law that it would be extremely difficult to ascertain the amount of compensation which would afford plaintiff adequate relief," also that "it was necessary to restrain the acts threatened to be done by the defendant to prevent a multiplicity of such judicial proceedings." (Rec. 54-5, Orig. 45-6.)

An appeal was taken to the Supreme Court of the Territory by which all the errors herein assigned and many others were presented for review. (Rec. 60, 61-2-3, Orig. 49, 50-1-2.)

The appeal was argued before the Supreme Court on October 7th, 1886. On October 9th following, the court handed down a judgment of affirmance, Frances and Church, JJ., dissenting, and Tripp, C. J., having acted as attorney for the plaintiff below, not sitting. The court stood 3 to 2 for affirmance. (Rec. 69, Orig. 57.)

The Supreme Court handed down no opinion, and gave no reasons in support or explanation of its judgment of affirmance.

The questions here presented and discussed are:

1. The absence of a proper party defendant, and want of jurisdiction to enter a decree as against the defendant named.
2. The absence of any facts found or established to warrant equitable interference.
3. The want of power in the District Court to cure its judicial errors by additional findings made long after judgment.
4. The insufficiency of the additional findings to aid or support the judgment.
5. The presence of a plain, adequate and complete remedy of law.

ASSIGNMENTS OF ERROR.

The decree is erroneous in this, to-wit:

I.

It was error to deny the motion made by appellant (defendant below) at the close of the testimony to dismiss the Complaint and direct a verdict, since upon abandonment and failure to prove the averments of fraud, malice, opression and collusion contained in the Complaint the Court was without jurisdiction to proceed in the case, there being no proper party defendant before the Court.

The Territorial Supreme Court erred in sustaining the action of the District Court in this particular.

II.

It was error to deny appellant's motion, made after verdict, to vacate the temporary injunction and dismiss the Complaint in this, that it then appeared the Court was in the particular above specified without jurisdiction; and further, in this, that it then appeared that the complaint was without equity, there being no evidence that the plaintiff would suffer any irreparable injury by reason of the seizure.

The Territorial Supreme Court erred in sustaining the action of the District Court in this particular.

III.

It was error to find as conclusion of law that plaintiff was entitled to the relief demanded, and that the temporary injunction should be made perpetual, in this, that said conclusion did not follow from, and was not warranted by the findings of fact, there being no finding, nor evidence to support a finding, that plaintiff would by reason of the seizure suffer any irreparable injury, or an injury that could not be adequately compensated in an action at law.

The Supreme Court erred in adopting and giving effect to said conclusion.

IV.

It was error to render a judgment for the relief prayed in the absence of a finding of jurisdictional facts sufficient to warrant equitable interference.

In affirming the judgment of the District Court the Supreme Court erred.

V.

It was error after judgment entered to make additional findings of fact and law in order to cure substantial errors committed by the Court, and to supply jurisdictional ground for support of its judgment.

In adopting and giving effect to the findings so made the said Supreme Court erred.

VI.

The first additional finding of fact was erroneous in this, that it was not responsive to any issue raised in the pleadings, and as a premise of fact is imperfect and incomplete.

The Supreme Court erred in adopting it and in giving it effect.

VII.

The third additional finding of fact was erroroneous in this, that it was in conflict with the findings previously made, and inconsistent, and was not supported by any evidence adduced upon the trial, and is a mixture of fact and law.

The Supreme Court erred in adopting and giving effect thereto.

VIII.

The first additional conclusion of law was erroneous in this, that there were no findings of fact to support it; and further, in that it does not state a sufficient jurisdictional ground for equitable interference.

The said Supreme Court erred in adopting and giving effect to said conclusion.

IX.

The second additional conclusion of law was erroneous in this, that it did not follow from, and was not supported by any findings of fact, and was not warranted by any admission, nor by any issue raised in the pleadings.

The said Supreme Court erred in adopting and giving effect thereto.

X.

The Territorial Supreme Court erred in not reversing the judgment of the District Court, it appearing that the plaintiff (Appellee) had a plain, adequate and complete remedy at law, there having been no evidence adduced at the trial that he would suffer any irreparable injury.

ARGUMENT.

I.

The motion to dismiss the complaint made by appellant (defendant below) at the close of the testimony (assignment of error I.) and again after verdict (assignment of error II.) should have been granted.

There was no proper party defendant of record against whom the court had jurisdiction to proceed.

The plaintiff below sought relief against the defendant for acts done and threatened by him while acting in his capacity as sheriff of the county of Lincoln, and under and by virtue of certain warrants of attachment directed to him. (Rec. 36, 5th finding of fact, Orig. 31.)

A public ministerial officer cannot be made a party to an action for an injunction to restrain the enforcement of a judgment or other process of a court. If so made, no decree can be taken against him.

Stout vs. McNeil, 98 North Carolina, 1-3.
Edney vs. King, 4 Ired. Eq. 465-474.
Lackay vs. Curtis, 6 Ired. Eq. 199-201.
Howell vs. Foster, 122 Illinois, 276-278.
Stevens vs. Forsyth, 14 Penn. St. 67.
Ashton vs. Parkinson, 8 Phila. 338.
Olin vs. Hungerford, 10 Ohio 268-272.
Allen vs. Medill, 14 Ohio 446-454.
Montgomery vs. Whitworth, 1 Tenn. Ch. 174-176.
Bloomstein vs. Brien, 2 Tenn. Ch. 778.
Holmes vs. Chester, 11 C. E. Green (N. J. Eq.) 79-80.
Daniels Chancery Practice (Coopers Ed.) V. 1, p. 296, note.
High on Injunctions, Sec. 1551.
Hillard on Injunctions, Sec. 139.

The defendant below had no material interest in the subject matter of the suit. With as much propriety might the Clerk who issued the writs, or the Court from which the writs were issued, have been made parties. Olin vs. Hungerford *supra.*

A decree in equity produces its effect by controlling the course of the person not by controlling a Court of law, or any part of its machinery, Stephens vs. Forsyth, *supra.* It operates upon the officer through the party who has the right to control his action, and may be executed upon the officer as upon any other agent of the party. Montgomery vs. Whitworth *supra.* If no one is brought before the Court but the Sheriff, a mere formal party, who has not the slightest interest in the subject matter of the suit, the Court is not at liberty to pass upon the questions proposed. Howell vs. Foster, *supra.*

All persons materially interested in the subject matter of the suit must be made parties. Without necessary parties the Court cannot pass to a decree.

Story's Equity Pleading, 83.
Shields vs. Barrows, 17 Howard, 130-140.
Barney vs. Baltimore, 6 Wallace, 280-286.

To the rule that the officer is not a proper party an exception is allowed in cases where it is charged that he is acting maliciously with intent to injure the defendant, or collusively with the creditors to defraud the defendant, or is an active agent in the commission of a fraud upon the defendant. In such case he is a proper party.

High on Injunctions, Sec. 1551.
Olin vs. Hungerford, 10 Ohio 268-273.
Allen vs. Medill, 14 Ohio 446-454.

The complaint in the case at bar was drawn to fit the exception, and on its face gave the court in this particular jurisdiction. It charged that the writs under which the defendant acted were irregular and pretended, that he had and was about to make an excessive levy, that he was acting maliciously and in collusion, and with intent to vex, injure and annoy plaintiff. These averments formed a breast work against a demurrer for defect of parties.

At the trial "all the allegations of fraud, malice, oppression and collusion on the part of the defendant were stricken from plaintiff's complaint on motion of plaintiff's attorney." (Rec. 48, Orig. 40 and Rec. 53, Orig. 44, 6th finding of fact.) At the close of the testimony defendant called the attention of the Court to the failure of the plaintiff to establish by any evidence whatsoever, any of the matters thus charged, and on the ground of total failure of proof in these particulars, asked that the Court dismiss the complaint and direct a verdict. This motion the Court denied, and an exception was taken and allowed. (Rec. 48, Orig. 40).

After verdict upon the question of fact submitted to a jury Appellant (Defendant below) filed and submitted to the Court a formal motion in writing for an order dismissing the temporary injunction and the complaint and action, for the reason among others, "That there is an entire absence from the record of the proper parties defendant". (*See record 23, 24, Orig. 21, subdivision V. of motion & Rec. 52*). This motion the Court denied, and an exception was duly taken and allowed. (*Rec. 35-52, Orig. 30-44.*

The Court erred in denying these several motions to dismiss. Whatever might be its conclusion respecting the plaintiff's ownership of the

property levied upon, and his right to peaceable undisturbed possession thereof, it was apparent there was no party in interest before the Court as defendant, and no party over whom it had jurisdiction, and against whom it could enter a decree.

That the Court likewise erred (Assignment of Error 11) in denying appellants motion to dismiss, founded on the absence of any evidence tending to prove that plaintiff would suffer irreparable injury by reason of the levy (*Rec. 24, Orig. 21, Sub. VI of motion to dismiss*) clearly appears from the subsequent finding "that no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the Sheriff of said property." (Rec. 36-53, Orig. 32-44, 7th finding of fact).

II.

At the trial the Court submitted to a jury a single question of fact, viz: Ownership of the property attached. The jury returned a verdict "for the plaintiff on all the issues." (Rec. 23-47, Orig 21-39.)

The Court, however, treated the verdict "as a verdict in favor of the plaintiff upon *the issue* submitted" (Rec. 35, Orig. 31), also as "but an advisory verdict" (Record 36-53, Orig. 32-44.) Upon the rendition of this verdict appellee (plaintiff below) moved the Court for a decree in his favor, and that the injunction be made perpetual. Thereupon the Court, as required by the Dakota code of civil procedure in cases of trial by the Court, (Secs. 266-267, quoted on page 12 of this brief) made its findings of fact and conclusions of law. The Court found as matter of fact, that

> 1. On the 13th day of November, 1883, one P. M. Lund was the owner of property described in plaintiff's complaint.
>
> 2. On said 13th day of November, 1883, said Lund sold and conveyed the said property to the plaintiff, and he (plaintiff) entered into immediate possession thereof.
>
> 3. That the sale by Lund to Peters the plaintiff was made by Lund for the purpose of putting said property and proceeds thereof beyond the reach of his (Lund's) creditors, and to defraud said creditors.
>
> 4. That the plaintiff at the time of the transfer of said property from said P. M. Lund had no knowledge of Lund's purpose in disposition of said goods.
>
> 5. That the defendant is, and at the time of said sale and transfer was, Sheriff of said Lincoln County. That on the 15th and 16th days of November, 1883, he the said defendant, as Sheriff aforesaid, levied upon the said property as the property of said Lund, the same being then in the possession of the plaintiff under and by virtue of certain warrants of attachment issued out of this Court at the suit of various creditors

of said Lund, being the same warrants of attachment the enforcement of which against said property is sought to be enjoined in this action.

6. That at the trial by the jury of the question of fact as hereinbefore stated, all the allegations of fraud, malice, oppression and collusion on the part of the defendant were stricken from plaintiff's complaint on motion of plaintiff's attorney.

7. That no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the Sheriff of said property.

The Court found as CONCLUSION OF LAW:

That the verdict of the jury heretofore rendered in this case on the question of fact as herein stated, is but an advisory verdict, and should be received and accepted only as such by the Court in determining the issues in this action. Under the pleadings and proofs therein the plaintiff is entitled to the relief demanded in the complaint; that the preliminary injunction heretofore issued should be made perpetual and final in accordancewith the prayer of the plaintiff's petition, let judgment be entered accordingly.

(*See Rec. 35-53, Orig. 31-44*).

To the findings and conclusion of the Court exceptions were duly taken and allowed, and as well to the total failure of the Court to find on material issues essential to a judgment. (Rec. 38-53, Orig. 33-45.)

It is obvious that the findings of fact do not support the conclusion of law. (Assignment of Error III.)

Irreparable injury, that is, injury that could not be repaired or atoned for in an action at law, was the sole ground upon which the Court could acquire or take jurisdiction of the subject matter of the action.

Watson vs. Sutherland, 5 *Wall.* 74-79.
Lewis vs. Cocks, 23 *Wall.* 466-470.
Hipp vs. Babin, 19 *How* 271-278.
Killian vs. Ebbinghaus, 110 *U. S.* 568-573.

This was the ground of jurisdiction set forth in the complaint upon which the prayer for equitable interference by injunction was based. If therefore the plaintiff in the action failed to adduce any evidence in support of his averments of irreparable injury, the Court had no power in the premises but to vacate the temporary injunction and dismiss the complaint.

Wells on Jurisdiction of Courts, Sec. 14.

A party bringing an equitable action must maintain it on equitable grounds or fail.

Mann vs. Fairchild, 2 Keyes (N. Y.) 106 et seq.

In the 7th finding of fact the Court under its hand solemnly declared that the plaintiff upon the trial adduced *no evidence* in proof of the averments of irreparable injury in his complaint contained. This recital made in the course of decision, and made and continued of record in the case, must be accepted as true, and if so any further question in the case is concluded.

It is immeterial that the 7th finding of fact is, as such, imperfect, and not an ultimate *conclusion of fact*, since under the system of express findings adopted and required in the Dakota code, the absence of a finding or failure to find on a material question at issue is fatal to the judgment.

Dakota Code of Civil Procedure, Sec. 267.

(quoted on page 12 of this brief.)

Dale vs. Burleigh, 1 Dak. 218-226.
Holt vs. Van Eps, 1 Dak. 198-212.
Uhlig vs. Garrison, 2 Dak. 99-111.

III.

At the time of the making and filing the above findings, the court, as a concurrent act, made and entered its decree, wherein it was adjudged that the injunction be made perpetual, and that plaintiff have and recover his costs then taxed and allowed; to which defendant duly excepted. (Rec. 37, Orig. 32.) Judgment was thereupon duly entered and docketed. (Rec. 38, Orig. 33.)

It is obvious that the action of the court in decreeing that the injunction be made perpetual was *coram non judice*. (Assignment of Error IV.)

IV.

At the time of the entering of the decree the court made an order giving the defendant in the action until the 2d Tuesday in November, "being the first day of the term of this court at Sioux Falls in and for Minnehaha county," within which to prepare and serve motion for a new trial and present bill of exceptions. (Rec. 39, Orig. 34.)

A motion for a new trial founded on errors assigned was duly made, and the same was on December 2nd, 1885, argued and submitted. This motion the court took under advisement, and "after due consideration thereof," the same was by order dated December 21st, 1885, denied. (Rec. pp. 54-43, Orig. 45-36.)

Thereupon, and against the objections of the defendant, and upon the motion and application of the plaintiff, the court found facts and conclusions of law in addition to those heretofore found. (Rec. 54, Orig. 45.)

These were as follows, to-wit:

1. That the purchase by plaintiff from P. M. Lund of the goods and chattels mentioned in the complaint included the good will of the business heretofore carried on by said Lund under the name of P. M. Lund & Co.

2. That the consideration for the said sale and transfer from the said P. M. Lund to the plaintiff was the sum of ten thousand three hundred and eighty dollars then and there paid by plaintiff to said Lund, and that said consideration was fair and adequate.

3. That at the time of the seizure by the defendant of the goods and chattels mentioned in the complaint * * * plaintiff was in possession thereof as owner, conducting a profitable business as a retail merchant, and that the acts and threatened acts of the defendant, under and by virtue of the said attachments mentioned and referred to in the pleading, would unless restrained by the Court, necessarily destroy plaintiff's said business, and deprive him of the probable profits that might be realized therefrom, and that it would be extremely difficult to ascertain or estimate the pecuniary detriment which the plaintiff would suffer.

4. That the said goods and chattels mentioned in the complaint, and the plaintiff's said business comprised his entire property and pecuniary resources.

5. That * * * * the defendant as Sheriff of Lincoln County seized the said goods and chattels under and by virtue of sundry warrants of attachment sued out against the property of P. M. Lund. That the defendant as such Sheriff then had in his hands many more such attachments against said Lund which he threatened to levy upon the said goods * * * * *

CONCLUSIONS OF LAW.

1. That it would be extremely difficult to ascertain the amount of compensation which would afford the plaintiff adequate relief from the acts done and threatened to be done by the defendant.

2. That it is necessary to restrain the acts threatened to be done by the defendant to prevent a multiplicity of such judicial proceedings.

3. That the plaintiff is entitled to the relief demanded in the complaint. (Rec. 54-5, Orig. 46.)

To these additional findings exceptions were duly taken and allowed. (Rec. 55, Orig. 46.)

The court was without power in the premises to make (long after the trial term, and nearly six months after the judgment) additional findings in support of its judgment. (Assignment of error V.)

It is conceded that courts have jurisdiction over their records to make them conform to what was actually done, that where the records do not speak the truth as to what was done, the court may amend them and make them conformable to the truth; and that as to defects in matters of form, judgments may be corrected within a reasonable time after their rendition.

Aetna Ins. Co. vs. Boon, 5 Otto 117, 125.

The power above stated is the inherent common law power of the court. It is a power now generally defined by the practice acts, and decisions of the several states, and it is understood that this court will adopt the rules established and follow the decisions of state courts in matters of practice.

The Dakota code of Civil Procedure provides as follows:

> Sec. 266. Upon the trial of a question of fact by the Court its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.
>
> Sec. 267. In giving the Decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly.

Levisees Dakota Codes, p. 79.

With respect to these requirements the Territorial Supreme Court as early as 1874 held:

1st That where a Judge in a cause tried by the Court fails to find on all the material issues, it is such error as will invalidate any judgment rendered therein.

2nd The Court cannot after pronouncing judgment re-open the case and make an additional finding, "that would in legal effect be no less than setting aside the judgment and rendering a different one".

Dale vs. Burleigh, 1 Dak. 218-226.

In the case cited the action was upon a promissory note. One of the averments of the answer was that the note was without consideration. Upon that issue the Court did not find, and the judgment was for this reason reversed.

That a valid judgment cannot be rendered unless all the material issues are passed on was also held in

Holt vs. Van Eps, 1 Dak. 198-212.

These decisions were subsequently followed and approved in Uhlig vs. Garrison, 2 Dak. 99-111.

These points of practice were solemnly declared by the Supreme Court of the Territory after argument thereon, and their adjudication was necessary in order to determine the cases wherein they arose. They thus became rules of decision in that jurisdiction, and, until other or different rules are declared, they must be deemed of binding force. They have never been by any reported decision of that Court either overruled or critised. It may be that in the case at bar the Territorial Supreme Court recognized in the District Court an inherent power to do whatever it might deem necessary in order to cure its errors and galvanize its lifeless judgment, or, it may be that the Territorial Supreme Court thought the findings first made all sufficient to support the judgment Of this we can but speculate, since the reasons that prompted affirmance remain unspoken and unwritten.

It is apparent that the amendments and corrections here made were not of form but substance. The Court not only found new facts, but adopted principles of law not contained in its former decision.

With the entry of the final judgment the jurisdiction of the Court ceased except to correct mistakes in the record.

Bank of the U. S. vs. Moss, 6 Howard 31-38.

Mistakes which may be amended do not include judicial errors in rendering judgment.

McLean vs. Stewart, 14 Hun (*N. Y.*) 472-476.
Rockwell vs. Carpenter, 25 *Hun* (*N. Y.*) 529-533.

In some jurisdictions Courts are permitted to supply ommitted findings by an order *nunc pro tunc* even after judgment. This may be done in Minnesota, (See Swantorm vs. Marvin, 38 Minn. 359), and in Wisconsin (see Williams vs. Ely, 13 Wis. 1), and in New York, (see Quincey vs. Young, 53 N. Y. 504), but it is a power given by and accredited to a statute, (see cases cited). I find in the laws of Dakota no such statutory warrant. And the question here is therefore, one of inherent power.

It should be noted that the additional findings here made were accompanied by no order directing that they be entered *nunc pro tunc* although the court, in settling the bill of exceptions, declared them to be part of the judgment roll. Nor does it appear by or upon what authority they were made, whether upon evidence received at the trial and matter of

record, whether upon the minutes or notes of the judge, or whether upon the faith of any record that may have slumbered in the breast of the judge. As said in Aetna Ins. Co. vs. Boon, supra, "ordinarily there must be something to amend by."

V.

The first additional finding of fact is not responsive to any issue raised by the pleadings, and as a premise of fact is imperfect and incomplete. (Assignment of Error VI.)

In his bill of complaint the plaintiff below averred that *he purchased a valuable trade established by said Lund & Co.* (Record 11, Orig. 10.)

The finding is, that the purchase from Lund & Co. included the good will of the business of Lund & Co.

It is not found that the good will was of any value, nor is it found that Lund & Co. had a well established or profitable business from which value might be inferred. Lund & Co. may have been in business a month or a day. Good will is but the chance of being able to keep the business *which has been established.*

Barber vs. Connecticut &c., 15 *Fed. R.* 312.

VI.

The third additional finding of fact, so far as it has reference to the profitable character of the business in which the plaintiff had engaged, is repugnant to, and cannot be reconciled with other established facts in the case, and is not supported by the evidence; and so far as it has reference to consequences, is not a finding of fact at all. (Assignment of Error VII.)

The court here finds that at the time of the seizure the plaintiff in the action was in possession of the goods, &c., *conducting a profitable business as a retail merchant.* He purchased the goods on November 13th, and on the 15th inst. the sheriff siezed and levied on them. (Rec. 36, Orig. 31, 5th finding of fact.) It thus appears that he had been engaged in business as a retail merchant one entire day. The finding of the court implied that the business had been tested by the plaintiff for a sufficient time to warrant the conclusion as a result of experience that it was profitable. In the nature of things there could have been no evidence to support such a finding.

In the same connection it was further found that the acts and threatened acts of the defendant would necessarily destroy plaintiff's business, and that *it would be extremely difficult to ascertain the pecuniary detriment* that would thereby follow. This is a conclusion of law that must follow, if at all, from facts established and found concerning (1) the character and prospects of the business in which the plaintiff had engaged, and

the probable effect thereon of the seizure and levy; (2) the character of the goods seized, whether perishable, or peculiarly adapted to the local trade or current season; (3) the plaintiff's credit, standing, situation, &c.

Only from established facts regarding these matters, or matters of like effect, could the Court conclude that the business of the plaintiff was about to be ruined, and that the injury suffered would be irreparable. The Court seemingly took a like view of this conclusion, and subsequently repeated it in and as its first additional conclusion of law.

VII.

The first additional conclusion of law is not sustained by the facts as found, and does not furnish a ground for equitable interference. (Assignment of Error VIII.)

To warrant the conclusion there stated it must have clearly appeared from facts found that there were advantages and opportunities in themselves valuable, inherent in or attending the plaintiff's particular business, that would as a natural consequence of the seizure be destroyed or impared; or that the plaintiff enjoyed well established relations and a fair commercial name that would likely be injured.

Upon facts such as these might be predicated a pecuniary loss that by reason of its purely speculative character a Court of law would not undertake to measure or compensate.

The mere fact that it is difficult to ascertain the amount of compensation which will afford adequate relief does not warrant equitable interference. A suit in equity, as said by this Court in Buzard vs. Houston, 119 U. S. 352, "can be brought only when the Court can give more complete and effectual relief in kind or in degree on the equity side than on the common law side, as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate or, *preventing an injury for which damages are not recoverable at law as in Watson vs. Sutherland, 5 Wall*, 74".

VIII.

The Second Additional Conclusion of Law does not follow from, and is wholly unsupported by the findings of fact, and is not warranted by any admission, nor by any issue raised in the pleadings. (Assignment of Error IX.)

From the fact found that a number of writs had been and were about to be issued against the property of Lund & Co., it did not follow that the defendant would, to protect his rights, become involved in a number of suits or judicial proceedings. Had he brought Trespass for the wrongful taking, every question that could possibly arise as to the rights of the attaching creditors could have been settled.

In Claim and Delivery for the goods all the rights of the respective

parties could have been fully determined. Had the defendant re bonded the goods in Claim and Delivery, the same issues could have been tried and determined in a single action.

The sheriff, the only party whom the court was asked to re-train, had not, and did not threaten to institute a multitude of judicial proceedings.

The intention of the court may have been to restrain the creditors through the sheriff by grace, from suing out writs and thus to save them the expense of furtile measures for the collection of their demands.

IX.

There existed a plain, adequate and complete remedy at law. (Assignment of Error X).

Watson vs. Sutherland, distinguished.

The bill of complaint in the case at bar was framed to fit the case of Watson vs. Sutherland, and its averments are set in nearly the precise language there used. The facts there found in support of the jurisdiction were as follows, to-wit:

1st. That Sutherland was the *bona fide* owner of the goods levied upon. 2nd. That he purchased these goods for the business of the current season, and that they were not all paid for. 3rd. That his only means of payment was through his sales. 4th. That he was a young man recently engaged in business. 5th. That he had succeeded in establishing a merchantable trade, and 6th. That if sale of the goods was delayed, the effect would be to break up his business, destroy his credit and render him insolvent.

The facts in Peters case do not run on parallel lines. He did not purchase the stock on credit, was not dependent on immediate sales to meet maturing bills. The goods for aught that is found, were worth as much to him at one time as another, and at one place as another. He had not acquired credit as a merchant, nor built up a trade upon which he could depend, at the most he was threatened with loss of "probable profits". In the absence of facts showing the likelihood and value of profits, it must be presumed in equity, as in law, that interest on the value of the goods from the time of the taking will equal or compensate the loss of profits.

The only remedy at law which the Court recognized as open to the plaintiff below in Watson vs. Sutherland was an action for the trespass.

Under the decisions of the Maryland courts, where the case arose, and under the decisions of this court, replevin against the Marshall could not have been maintained.

Powell vs. Bradlee, 9 *Gill & J. 274.*
Freeman vs. Howe, 24 *How. 450.*

But Replevin, or Claim and Delivery, may be maintained against a sheriff.

Wells on Replevin, Sec. 260.
Cobbey on Replevin, Sec. 300.

In replevin a plaintiff is not only entitled to immediate possession of the property, but where the defendant as was here charged has been guilty of fraud, malice or oppression, he is entitled to exemplary damages. True, it remains in the power of the defendant in replevin to rebond the goods and reclaim possession, but this is a power rarely exercised, except where the subject matter of the action is a thing of peculiar and personal value, and in Dakota can be only upon the giving of an undertaking conditioned for the delivery of the property to the plaintiff if so adjudged, and *for the payment to him of such sum as may for any cause be recovered against the defendant.* (Dakota Code of Civil Procedure, Sec. 181.)

It is submitted that this action would have furnished a remedy plain, adequate and complete, and more practical and efficient than the remedy in equity. This was the opinion of the Supreme Court of Illinois in Long vs. Barker, 85 Ill. 431, in which case the court was asked to exercise its extraordinary jurisdiction upon a complaint very similar to that here presented. The property in question was a portable steam saw mill that had been taken from complainant under legal process. Complainant avered that he was the owner. That after buying the mill he at great expense moved it to its present site. That he had bought a great many logs which were there on the ground ready to be sawed into lumber, and that if he was deprived of possession he would suffer irreparable loss. It was held that in the action of replevin complainant had a full, complete and adequate remedy.

A case similiar in principal arose in California. There complainant was the owner of premises used as a wharf which he alleged that defendants were forcibily, and by violent means, about to take from him, and were preparing and attempting to drive therefrom his workmen. An injunction was refused, the Court holding that the action of forcible entry and detainer furnished a speedy remedy, and that interruption of his business did not alone furnish ground for equitable interference.

Tomlinson vs. Rubio, 16 California, 203-207.

To the effect that where the title to personal property can be settled in an action of replevin equity will not interfere, except where the thing is of peculiar value and cannot be replaced. See

Baker vs. Rinehard, 11 West Va. 238-245-6-7.
Davidson vs. Floyd, 15 Fla. 667-671.

Boulin vs. Alexander, 7 T. B. Monroe 425-6.
Johnson vs. The Connecticut Bank, 21 Conn. 148-156.

The right asserted in this action, viz., right of possession, was primarily a legal right, for breach of which the law provides a legal remedy. The remedy sought was equitable. The right to it depended on the presence of equitable circumstances. Upon their alleged existence the court took equitable cognizance of the case.

The facts found, accepted at their best, not only fall far short of the facts as alleged in plaintiff's bill of complaint, but they are of very doubtful equitable character.

While there can be no exact rule by which to determine the limitations of the concurrent equitable jurisdiction, and while the application of the equitable principle must depend upon the character of the case as disclosed, yet there must be present clearly established facts of a positive equitable character from which the conclusion follows that the legal remedy is inadequate and insufficient to do justice.

The question is not whether appellant may not have had under the methods adopted and pursued in this case, ample opportunity to assert and maintain his alleged rights, but rather was it a case for the adoption of such methods—a case where a court of equity should interfere? Experience has taught that justice can be more certainly and expediously obtained under a strict administration of the rules of law than under a system which attempts to isolate a particular case and decide it upon considerations of its own individual circumstances. If the judgment herein is affirmed this case will become a precedent for equitable interference in almost any possessory action where the title to personal property is in issue, and its effect will be, in actions of this class, to deprive a party of his constitutional right of a trial by jury, or at least to compel him to leave the granting of that right to the discretion of a trial judge.

We submit that it would be an encroachment upon long settled principles, and a dangerous precedent to establish.

Appellant asks that the judgment be reversed, and that the cause be remanded to the Supreme Court of the State of South Dakota (in which jurisdiction belongs the county of Lincoln, where said action was brought and tried), with directions that the complaint and action be dismissed.

FRED B. DODGE,
Counsel for Appellant.

SUPREME COURT, U. S.
FILED,
DEC 17 1890
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

—OF—

THE UNITED STATES.

OCTOBER TERM, 1890.

No. 148.

J. M. NORTH, Appellant,

vs.

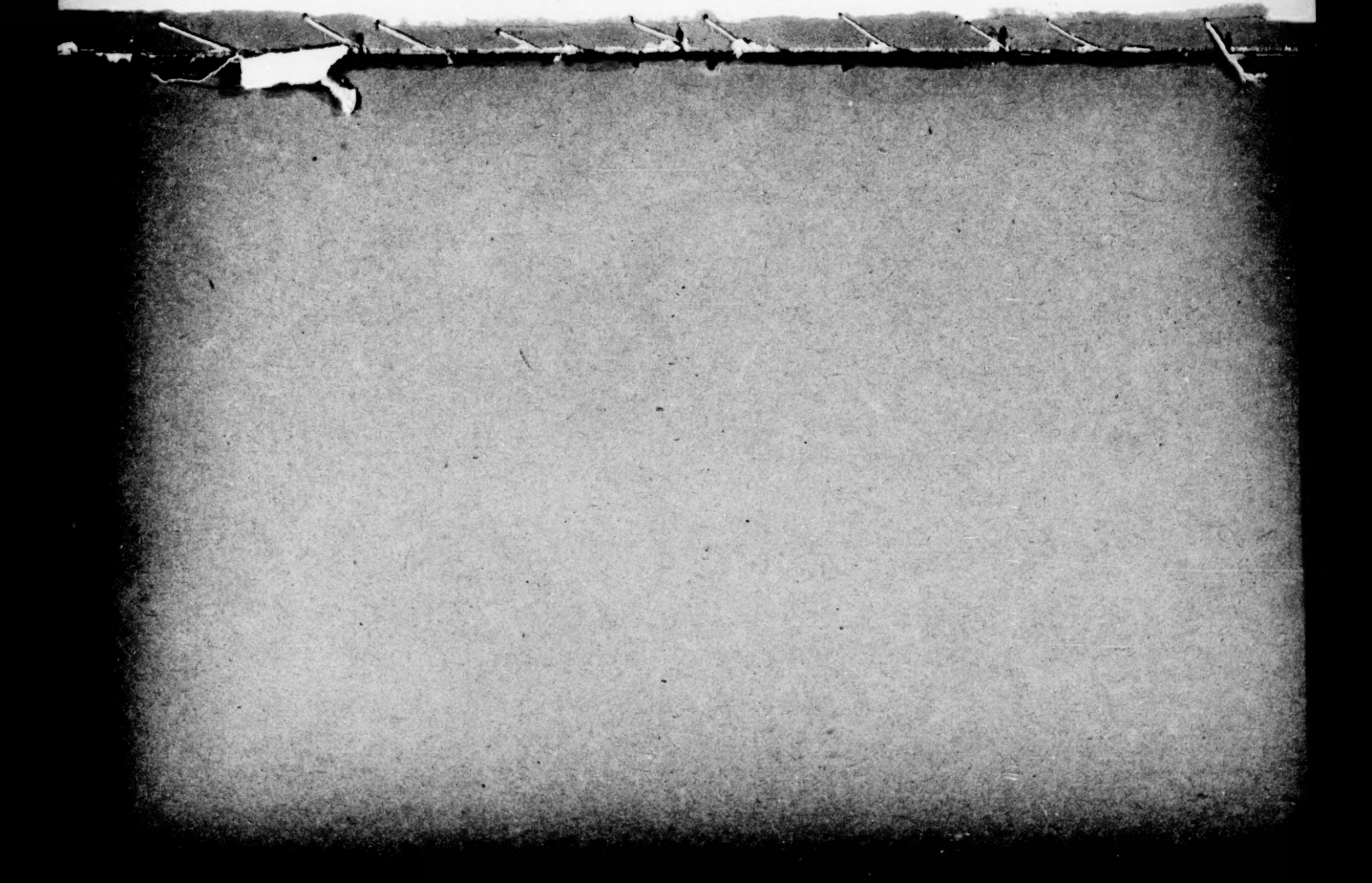
ANDREW PETERS, Appellee.

Appeal from the Supreme Court of the Territory of Dakota (Now South Dakota).

APPELLEE'S BRIEF AND ARGUMENT.

J. W. TAYLOR,
Attorney for Appellee.

Lew Rader, Printer, 1003-1012 N. Y. Life Bld'g, Omaha, Neb.



IN THE SUPREME COURT

—OF—

THE UNITED STATES.

OCTOBER TERM, 1890.

No. 148.

J. M. NORTH, Appellant,

vs.

ANDREW PETERS, Appellee.

Appeal from the Supreme Court of the Territory of Dakota (Now South Dakota).

STATEMENT OF THE CASE.

This was an action brought to restrain a threatened trespass. The right to maintain the action rests upon the ground that irreparable injury would result from its commission.

The issues of fact having been submitted to a jury and found in favor of the plaintiff, "on all of the issues," in addition the court made and filed its findings of fact and conclusions of law, and

additional findings of fact and conclusions of law. The court having rendered its decree and judgment, the defendant took an appeal to the Territorial Supreme Court which latter court affirmed the decree and judgment of the court below.

The defendant brings the case into this court for review upon thirty-two assignments of error. (Transcript, pages 71 to 74).

Council for appellant *in his brief condences* and sets out *ten* assignments of error. (Pages 4 and 5).

JURISDICTION.

First—appellee objects to the jurisdiction of this court upon the following grounds:

1. The Territory of Dakota having been admitted into the Union as States, this court is no longer the Appellate Court for the former Territory in a case of this kind. The case presenting no federal question or other fact to confer jurisdiction, the act admitting the state, making no provision for cases pending in this court, the authority to hear and determine it resting upon statutory law.

Sheppard vs. Wilson, 5 How., 210.

Congress cannot give this court original jurisdiction, except in cases described by the constitution.

Marbury vs. Madison, 1 Cranch, 737.

2. The bond on appeal in this case not having been approved *in time* by the Chief Justice or Associate Justice of the Territorial Supreme Court. Security taken without citation is not good.

W. U. Tel. Co. vs. Eyser, 19 Wal., 419.

O'Reilly vs. Edrington, 6 Otto, 724.

First Nat. Bank vs. Omaha, 6 Otto, 737.

3. The appeal was allowed after the remittitur had been filed in the court below, and without ordering its return.

Appeals are subject to same rules and restrictions as writs of error. Rev. Statutes, Sec. 1012.

The remittitur having been sent down, the Territorial Supreme Court had no jurisdiction over the case, and no authority to allow this appeal.

Gelston vs. Hoyt, 3 Whet., 246.
McGuire vs. Commonwealth, 3 Wall., 382.
Atherton vs. Fowler, 1 Otto, 143.
Crane Iron Co. vs. Hoagland, 15 Otto, 701.
Coldwell vs. Bruggerman, 8 Minn., 286.
Black vs. Bowman, 22 Cal., 23.
Leese vs. Clark, 20 Cal., 387.
Grogan vs. Buckle, 1 Cal., 193.
Dresser vs. Brooks, 2 N. Y., 559.

Martin vs. Wilson, 1 N. Y., 240.
Buckle vs. Luce, id., 239.
Frazier Taylor vs. Western, 3 How. Pr., 235.
Latson vs. Wallace, 9 How. Pr., 334.
Delaplaine vs. Bergen, 7 Hill, 591.
Legg vs. Overbagle, 4 Wend., 188.
Cushman vs. Hadfield, 52 N. Y., 653.

See Hayne on New Trial and Appeal, § 293, citing:

People vs. Sprague, 57 Cal., 147.
Blanc vs. Bowman, 22 Cal., 25.
Roland vs. Kreyenhazen, 24 Cal., 58.
Leese vs. Clark, 20 Cal., 417.
Grogan vs. Buckle, 1 Cal., 194.

Should this court find that it has jurisdiction then appellee presents the following authorities, points and argument.

I

Was the sheriff, North, a proper party defendant? It is true that formerly in equity parties in interest were brought in at any stage of the proceedings to prevent a multiplicity of actions, but this rule has been changed by the code. We have now but one form of action where the defect of parties, either plaintiff or defendant, appears upon the face of the complaint, the party seeking to take advantage of such defect must demur or such defect is deemed to be waived, and where the defect of parties is not apparent upon the face of the complaint, it must be taken advantage of by answer or such defect is waved. Code of Civ. Pro., Sec. 117; Wait's Code Sec. 148, note "c." Where a demurer can be interposed for a defect of parties, the defendant is confined to that remedy alone and it is only where evidence is necessary to make the defect apparent, that an answer to that point is permitted. 37 N. Y., 372. And in Jack vs. Cook, 6 Cal., 165, the Court early laid down the same rule. And this may be considered to be the settled rule, both in law and equity, wherever the code has been adopted.

But the defendant's position is not that there is a defect of parties defendant, but that there is no party defendant; a position he is driven to take under the code. The question becomes then, was the sheriff a proper party? If he were a proper party or if he could be made a party defendant under the facts of this case, then whether the creditors of P. M. Lund & Co., were proper parties, is entirely immaterial. For if this defendant were a proper party he cannot at this time be heard to say that there were other proper parties who should have been joined with him. His mouth is now closed to make

that suggestion. He waived his right to such objection when he failed to raise it by demurrer or answer.

It is true the sheriff is the officer of the court while he is obeying the madate of the court in serving its process but no longer. When he disobeys the command of his writ he is no longer an officer of the court; he becomes a trespasser and is not protected by his writ.

It is true that sometimes as to mere matters of law of which he is permitted to judge, he may be protected by his writ, if fair upon its face, but as to matters of fact of which he is required to determine he is never protected when acting outside of the command of his writ. Says Mr. Cooley: "Wrongs by a sheriff to others than the parties to suits are generally a consequence of his mistakes or his carelessness. Thus he may on an execution against one person by mistake seize the goods of another. He must, at his peril, make no mistake here. It might be urged that, in such cases the sheriff should have the ordinary protection of judicial officers, for he must inquire into the facts and he must decide upon the facts who the owner is. But this does not render the functions of the sheriff judicial. Ownership is matter of fact. * * The difference is that the sheriff is to obey an exact command but the judicial officer has to follow his judgment." Cooly on Torts, 396.

With reference to the question now under consideration of writs and processes of the court, they may be divided into two classes: 1st. Those which point out specifically the property or thing to be seized. 2nd. Those which command the officer to make or levy certain sums of money out of the property of the party named. The distinction between these two classes of writs is well drawn in the case of Buck vs. Colbath, 3rd Wallace, 334: "In the first class the officer has no discretion but must do precisely what he is commanded; therefore, if the court had jurisdiction to issue the writ, it is a protection to the officer in all courts. But in the second class the officer must determine for himself whether the property which he proposes to seize, under the process, is legally liable to be so taken, and the court can afford him no protection against the consequences of an erroneous exercise of his judgment in that determination.

He is liable to suit for injuries growing out of such mistakes in any court of competent jurisdiction.

In executing the former, he may be said to be the officer of the court, and in executing the latter, he would probably be held to be the officer of the court so long as he acted within the implied command of his writ.

But the moment he disobeys such writ, or goes beyond its im-

plied command, that moment he is a trespasser and like any other trespasser unarmed by the process of court

He is no longer protected by his writ and is no longer an officer of the court in performance of such unlawful act.

Says Mr. Justice Miller in Buck vs. Colbath, *supra*: "He is liable to plaintiff, to defendants, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured, for the court is in nowise responsible for the manner in which he exercises that discretion which the law reposes in him and in no one else."

The command of his writ was that the sheriff attach and safely keep the property of P. M. Lund & Co. It did not authorize him to seize the property of Andrew Peters, and when he elected to seize and take into his possession the property of this appellee, he became a trespasser. He was no longer protected by his writ and in the doing of this unlawful act he was not the officer of the court.

The sheriff is not the agent of the party whose process he serves. He is an officer of the law. He is the agent of neither party. He is dependent on all parties. He is subject to suit by either party for non-feasance, misfeasance or malfeasance in the duties imposed on him by law.

Wyngard vs. Banning, 39 Cal., 543.
Jacobs vs. Latour, et. al., 15 Eng. Com. L. Rep., 506.

It might, with much force, be argued that the only parties in interest in such cases are the parties who directed the issue and levy of such process. And that the service of an injunction upon such parties would find the officer. But it will be found upon examination of the cases, that it has been the invariable practice to join the officer, as party defendant.

Grigsby vs. Burnett et. al., 31 Cal., 406.
Scott vs. Onderdonk, 14 N. Y.
Macklot vs. City of Davenport, 17 Ia., 379.
Hart vs. The Mayor of Albany, 3 Paige, Ch., 212.
Treadway vs. Schnauber, et. al., 1 Dak., 236.
Ryan vs. Brown, 18 Mich.

The cases are very numerous in Cal. and other states in which restraining orders have been issued against corporation, boards and individuals seeking to enforce some illegal order or process of court, and in every case so far as we have examined, the officer or person seeking to enforce or execute such order or process, has been made a party.

Closely allied with the cases already cited, in all of which the order or process has directed the specified act to be done, is that class

of cases in which the party in whose favor the act is to be done or the process to be executed, has a direct lien upon or an interest therein.

Goodell vs. Bloomer, et. al., 41 Wis., 436.
Miller vs. Little, 47 Cal., 348.
Hickman vs. O'Neil, 10 Cal., 293.

They are presumed to direct and control the proceedings, and are, therefore, proper if not necessary parties, to this class of cases belongs. Olin & Hungerford, 10 Ohio, 268, cited and relied upon by the appellant.

The question in that case, like the cases already cited, was one of lien, the question in which the judgment creditor was directly interested and one in which she was presumed to have directed and controlled the action of the officer in making levy.

This case, therefore, may be dismissed with the remark that it belongs to that great class of cases in which the judgment creditor is directly interested and is the proper party to the action. The case differs from all the other cases cited and from all the cases that we have examined upon this question in holding that the sheriff in that case was not a proper party. In this the case stands alone. The court cites no authority for its conclusion, and in fact none can be found. The precedents and the decisions are all the other way.

Precisely the same question presented in Olin vs. Hungerford, came before the Mich. Supreme Court in Haddon vs. Hemingway, et. al., 39 Mich., 615.

The court held it was not a lein as in the Ohio case. And the same question arose as to whether the sheriff in whose hands the execution was placed, was a proper party and that court held directly the contrary to the Ohio court; that the sheriff was not only a proper but a necessary party. The same question arose in Burpee vs. Smith, et. al. Walkers, Ch., 327.

The officer was made a party to the bill, and the officer having appeared and demurred upon the ground that he was not a party in interest, the court held that he was not only a party but a necessary party.

See Watson & Gallup vs. Fuller & Wadsworth, 9 How., 425.
Fellows vs. Fellows, 4 Johnson's, Ch., 24.

Notwithstanding, therefore, that Olin vs. Hungerford, so far as it attempts to hold that the officer in that case was not a proper party, stands alone, and is opposed not only by the wright of decisions, but by the constant practice of all other courts, and as is frankly admitted in that case, by the courts of the state of Ohio.

We might with entire safety admit the doctrine of that case and

admit all that is claimed for it by the appellant and yet it would have no applicability to the case at bar.

The cases cited and heretofore discussed are distinguishable and entirely different from the one under consideration. This is a clear case of trespass. There is no pretense that the officer was acting under or in obedience to the command of his writ. He was commanded to levy upon the goods of Lund & Co., and in disobedience thereto, he levied upon the goods of Peters. This cannot be denied, whatever the allegations may have been made in the answer, or whatever claim may have been made by his proof that the goods levied upon belonged to Lund & Co., the jury have found against him. He stands before the court, so far as the objection made at this time is concerned, an admitted trespasser. He has never claimed by his pleadings or his proof to have acted as the agent of any creditor, nor would any such claim have been of any validity while he was acting as sheriff.

And his other claim to have acted to the service of this process as the officer of the court now fails him by the finding of the jury that the goods were the property of Peters. No ground is therefore left for him to stand upon, except now to claim that although he was a trespasser, other persons also were trespassers, and they should also have been made parties and restrained.

It is true that formerly it was a doubtful question whether the equity court would interfere to enjoin a mere trespass, but the question in American courts is no longer open for discussion. And trespasses like other threatened injuries will be restrained by the equity court when brought within the well known equity rules, among which are irreparable injury to the threatened party. It is not an action brought to set aside the creditors attachment against Lund & Co.; it is not an action like many of those cited to set aside a creditors judgment; it is not an action to determine the creditors lien upon real property; it is not an action to determine any matter of right in which the creditors have a direct interest. The creditors do not appear to have set in motion any process commanding the officer to do any particular act. There is no allegation of the complaint or the answer that the creditors ever directed or advised the sheriff to levy upon the property of Peters. On the contrary, the process which the creditors are presumed to have directed to be issued and levied, command him to levy upon the property of Lund & Co. There is no presumption of law that the creditors advised and directed the sheriff to commit a trespass. But the presumption is that the creditors intended that the sheriff should take no action under his writ not authorized by its terms. The doctrine is very well stated by Freeman in his work

on Executions, Sec. 273. And Chancelor Kent states the same doctrine in Adams vs. Freeman, 9 Johnson's, Rep., 118.

Judged by these rules, how can the defendant now be heard to say that the creditors are necessary or even proper parties? Where does it appear in the pleadings or proof that the creditors ever advised or directed the sheriff to levy upon this property, or that they have ratified his acts in so doing? As the case now stands upon the finding of the jury, the sheriff is a trespasser, and the court cannot presume in absence of all allegations and proofs to the contrary, that the creditors sought to be brought in, were also trespassers. On the contrary, the court is bound to presume that they were not trespassers.

That they did not advise or direct this trespass, and that they have not ratified it.

In fact, as said by Chancelor Kent, their ratification "must be clear and explicit and founded on full knowledge of the pervious trespass." The appellant appears to have been the only actor in the commission of this trespass.

The appellee saw and knew no other trespasser, and could not know that the creditors or any of them had directed the commission of this unlawful act.

It will be conceded that the sheriff was liable in damages in this case for whatever loss this appellee may have sustained by reason of the unlawful seizure. And if his act, when committed, would be a trespass, cannot he be restrained from committing an act which when committed would produce irreparable injury? Must the plaintiff in order to restrain the active trespasser bring in all who have advised or directed the trespass to be committed before he can restrain the one engaged in committing the act? Must he after trial and a verdict and findings in his favor, when creditors claimed to be co-trespassers have lain by without asking to be made parties, and without proof of any fact entitling them to be joined in the defense as co-trespassers, must the plaintiff, we say, await his judgment of injunction until the question of whether others advised and directed or have ratified appellants acts and are thereby co-trespassers, be determined by the court? Clearly not, when it is once admitted that equity will restrain the commission of a trespass, it must be admitted that the restraining process may run against any or all who would be liable as principals, if the trespass were not committed.

In Poirier vs. Fetter, 20 Kan., 47, the road supervisor undertook to tear down the plaintiff's fences and to open a highway through his premises, no legal order having been made by the proper author-

ities opening a road across his land. The plaintiff brought an action of injunction against the officer alone to restrain the trespass.

Brewer, judge, in delivering the opinion of the court, says: "This is an action of injunction to restrain the defendant as a public officer from tearing down fences for the purpose of opening a public highway through plaintiff's land where in fact no highway had ever been established. The petition alleges ownership by plaintiff, the non-existence of a highway and the acts and threatened acts of the officer. The question arises on demurrer, and it is objected that the wrong is a mere trespass, that the trespasser is not alleged to be insolvent, &c. We see no error in the ruling of the district court." The court then goes on to say, that while a mere trespass will not be restrained, that where it is shown that the injury will be irreparable the trespasser in all cases be restrained." No other persons but the officer were made parties, for in that case no other persons but the officer were shown to be liable.

In Osborn vs. U. S. Bank, 9 Wheat., 738, Chief Justice Marshall, in delivering the opinion of the court says: "But if the person who is the real principal, the person who is the true source of the mischief, by whose power, and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best establised principals to say that the laws could not afford the same remedies against the agent employed in committing the wrong, which they would afford against him, could his principal be joined in the suit.

It is admitted that the privilege of the principal is not communicated to the agent, for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury.

It being admitted then, that the agent is not privileged by his connection with his principal; that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court be applied to him? Why may it not restrain him from the commision of a wrong which it would punish him for committing.

We put out of view the character of the principal as a sovereign state because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court." And the injunction was sustained. The case is a leading one and much stronger than the case at bar. The state of Ohio, upon the face of the papers was directly interested. It was the party who had issued and directed the service of the pro-

cess. The action was brought under the old proceedings in equity, which required all parties to be brought before the court, before a final decree would be entered. The question for the officer to determine in that case was one of law, to-wit: Whether the act under which his process issued was unconstitutional. Yet the court held that the law being unconstitutional the process was void and no protection to the officer; that he was a trespasser, and that his unlawful acts would be restrained.

Suppose the creditors were made parties by proper allegations of the complaint, and the summons and pleadings should be amended accordingly as they would be required to be—Penfield vs. Wheeler, et. al. 7 N. W. Rep., 364,—and being made parties, suppose they came in and answered that they never directed or advised and have never ratified the acts of the sheriff, in what condition would we then be? Such an answer would be perfect defense, and if its allegations were proved, the action would fail as to them. In such case would it be claimed that this appellee could not continue his action against the sheriff to make the injunction perpetual as to him? Will it be contended that the sheriff cannot be restrained when he becomes a trespasser and commits an illegal act of his own motion? Such a doctrine would hardly be urged, and if the appellee could proceed against the sheriff, after the creditors have proved non-connection on their part, could he not proceed against him in the first instance?

Is there any question that this appellee could not have brought his action for damages against this appellant for his wrongful seizure of his property, and joined thereunder an action and prayer for an injunction against future trespasses under the code? And could the appellant in proper time, by demurrer or answer, have plead a defect of parties and asked these co-trespassers be joined? Clearly not. Trespass is joint and several. The plaintiff has the right of election to sue one, two, or as many of the trespassers as he pleases, or he may join them all in one action at his election, and the appellant cannot claim the right of having his co-trespassers joined. He is a wrong-doer. He is liable severally for his wrongful acts in the amount of damages sustained. And if he has no right or interest in having his co-trespassers made parties in an action for damages, what possible interest can he have in an action which only seeks to restrain him without any demand for damages in having his co-trespassers restrained.

II.

No findings of fact and conclusion of law, by the court, were necessary.

The evidence in the case is not before the court and can not properly be considered.

It has always been a mystery to counsel how the 7th finding crept into the case. That it was a mistake, is plain. It was conceded that *irreparable injury* was proved, and it was for this reason and upon due notice and showing that the court in furtherance of justice to correct the mistake and to make the record conform to the truth, filed the additional findings, the case still being within its control. We contend that the verdict of the jury is regular, and if any error exists it took place after that, and lies in the failure of the court to find certain facts as proved in the first instance. It is contended that the additional findings could not be made to support the judgment. It would have been an unnecessary act to set aside the judgment and reenter it. Courts never require idle acts. At the most it amounts to error without prejudice. Civil Code, Dak., § 2085.

That there is no question but the trial court had full power to amend its record to conform to the truth and that this right is inherent and may be exercised at any time up to appeal. The clear weight of authorities show:

See Mecham vs. Burke, 54 N. Y., 217.
Quincy vs. Young, 53 N. Y., 504
Moeyan vs. Mulligan, 50 N. Y., 665.
Lefler vs. Field, 47 N. Y., 407.
Van Slyke vs. Hyatt, 46 N. Y., 259.
Hayes vs. Wetherbee, 60 Cal., 396.
Ogburn vs. Connor, 46 Cal., 496, and cases cited.

In Ogburn vs. Connor the Court say: "The point is made that the additional findings made at request of plaintiff, can not be considered; but we think it not well taken. * * And when additional findings are called for they may be, and ordinarily must be, filed subsequent to the entry of judgment,"

See generally Frey 2, Owens 44, N. W. Rep. (Neb.) 42.
Bilansky vs. State, 3 Minn., 427.
Browner vs. Davis et al., 15 Cal., 9.
O'Connell vs. Coher, 44 Ia., 48.
Wyman vs. Buckstaff, 24 Wis., 477.
Hill vs. Hoover, 5 Wis., 386.
Walker vs. State, 1 N. E. Rep., 856.
Batchelder vs. Brickell, 17 Pac. Rep., 441.
Truly vs. Lane, 45 Am. Dec., 305.
Tillotson vs. Cheetham, 3 Johns, 95.
Stakes vs. Campbell, 7 Cow., 425.

Territory vs. Christensen, 31 N. W. Rep. (Dak.) 847 and note.
Bietman vs. Hopkins, 9 N. E. Rep., 720.
Rew vs. Barker, 14 Am. Dec., 515 and note.
Rockfeller vs. Donnelly, 8 Cow., 623.
Atkins vs. Sawyer, 11 Am. Dec., 193 and note.
In point and cases cited.

The time which elapsed between the first and second findings of the court is immaterial. The matter was duly kept alive for the various steps taken by consent of the attorneys and orders of the court as provided by law and rules of court. Then Ch. 147, laws 1885, p. 214, Dakota, does away with the point.

On appeal findings must be taken as true.

Eilers vs. Boatman, 111 U. S. 357.

Findings of District Court approved by judgment of affirmance are the findings of Sup. Ct.

Stringfellow vs. Cain, 9 Otto, 610.

Findings of court are to be construed as a verdict of a jury and a Supreme Court will not disturb them when there is any evidence to support them; 74 Am. Dec., 600; 71 id. 385, 65 id. 745, 59 id. 314, 33 id. 460. 28 id. 530, 34 id. 684, 72 id. 613, 67 id. 89, 63 id. 414, 13 id. 172, 24 Wis. 477, 7 S. W. Rep. 550, 33 N. W. Rep. 78.

At the most the two findings as to "irreparable injury" are but inconsistant, but taking the whole case into consideration, the facts and circumstances and the further fact that the additional findings were made to correct a mistake, we contend that the latter finding should control.

III.

This case is in point with Watson vs. Southerland, 5 Wall., 74. Peters purchased the good will and trade established by Lund & Co. It was not necessary to find its value, how well or how long established or how profitable. Peters stepped into Lund & Co.'s shoes and *continued* an established business, proved to be profitable, no matter how long Peters had it, three days was considered sufficient by the court and jury, and the findings upon those points are conclusive.

Peters was the *bona fide* owner of the goods, the business established and good will levied upon. Peters was an old man and his only means of payment, living and expenses was through his sales, the stock, goods, trade, etc., composed his entire property and resources. The trade had been established. The sheriff had a large number of writs against Lund & Co., which he threatened to levy against the goods of Peters. Here there was a multiplicity of

suits to be avoided. The enjoining of an officer from stepping in and taking *all* Peters possessed, stopping the trade, ruining the business, driving customers elsewhere, loss of the good will all combining to make such a case as afforded no plain, speedy and adequate remedy at law—no remedy that might avoid a large number of suits, and no way to compute or measure damages to afford adequate relief and compensation. Every case depends upon its own circumstances. It is hard to imagine a case, where, if you take *all* a man has as in this case, it would not break him up in business and taking what *he* had, work irreparable injury. The simple value of the goods was not all. By being deprived of them you took his *all* and left him stripped with his established trade, good will, etc., on hand, with a multiplicity of suits upon him, which, in his impoverished condition, he must defend at law for the value of the goods taken, but what about compensation for ruining him; loss of business, good will, avoidance of many suits, etc., which equity alone afforded him relief. The trial court and jury took this view of the facts in this case.

The right to maintain the action is no longer an open question.

See Hilliard on Injunctions 234, § 126 and cases cited.

Watson vs. Southerland, 5 Wall, 74.

The fact that "irreparable injury" and "multiplicity of suits" were proved—proof of either was sufficient to warrant the interposition of the equity powers of the court.

J. W. TAYLOR,
Council for Appellee.

Office Supreme Court, U. S.
FILED,
APR 25 1889
JAMES H. McKENNEY,
CLERK.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

ANDREW PETERS,
Appellee.

vs.

J. M. NORTH,
Appellant.

APPELLANT'S BRIEF ON MOTION TO DISMISS APPEAL.

John W. Cary &
C. H. WINSOR, Counsel for Appellant.

SUTTON & BEACH, PRINTERS, SIOUX FALLS.

IN THE

Supreme Court,

OF THE

UNITED STATES.

ANDREW PETERS,
Appellee,
vs.
J. M. NORTH,
Appellant.

APPELLANT'S BRIEF ON MOTION TO DISMISS APPEAL.

This case is clearly an equity case, in which issues were submitted to the jury who returned a verdict which was advisory, and upon which the Court made its findings of fact and conclusions of law and rendered its judgment. After judgment and after motion was made for a new trial, the Court made further findings of fact. This should be sufficient to show this Court that the *case was tried by the Court*, the verdict of the jury simply being for the purpose of advising the Court. Again, the action being for a perpetual injunction, and nothing more, discloses its chancery nature

It follows "ex necessitate" that the case must be brought from the Supreme Court of Dakota Territory to this Court by appeal.

While it is true that by carelessness the appellant failed to have the appeal bond approved, he now offers an approval of it, and this Court has frequently decided that even where no bond was given, it would allow a bond to be taken and approved.

2 Anson vs Blue Ridge R. R. Co., 23 How. 1.

Brobst vs Brobst, 2 Wall. 96.

Seymour vs. Freer, 5 Wall. 822.

Where an appeal bond is irregular, the Supreme Court will not dismiss the appeal; but may allow the appellant time to file a correct bond.

Bigler vs Waller, 12 Wall., 142

Appeals and Writs of Errors are only allowed from the final judgments and decrees of the *Supreme Courts* of the Territories.

Sec. 702 Revised Statutes.

The remittitur, as it is called, is simply a copy of the judgment of the Supreme Court sent to the Court below. The judgment remains in the Supreme
3 Court. In this case no supersedeas was asked for, and the bond given is simply for costs. The record discloses that a motion for a rehearing was entertained by the Supreme Court of Dakota and denied by a divided court after counsel had procured the remittitur sent down, and after that motion had been disposed of, then an appeal was allowed to this Court almost immediately. An appeal is a matter of right, and the statute only gives an appeal from the final

judgment of the Supreme Court.

The Supreme Court of Dakota retains its own records, and the appeal was properly taken from its decision.

Atherton vs Fowler, 91 U. S. 143.

The very fact that a complete transcript has been made and sent here by the Clerk of the Supreme Court of Dakota Territory, on the allowance of this appeal, shows that the entire record appealed from remains with the Supreme Court.

Respectfully submitted,

John W. Cary & Co

C. H. WINSOR,

Counsel for Appellant.